Supreme Court, U.S.
FILED

981091 JAN 6 - 1999

OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

TIME WARNER ENTERTAINMENT CO., L.P., *ET AL.*,

Petitioners,

v.

PATSY ANN BYERS, *ET AL.*,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeal Of Louisiana, First Circuit

PETITION FOR A WRIT OF CERTIORARI

JACK M. WEISS
MARK B. HOLTON
AMY L. NEUHARDT
GIBSON, DUNN & CRUTCHER LLP
200 Park Avenue
New York, NY 10166
(212) 351-4000

THEODORE B. OLSON
Counsel of Record
THOMAS G. HUNGAR
JOSEPH D. MATAL
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Counsel for Petitioner

92 pp

QUESTIONS PRESENTED

1. Whether the court below erred in holding that a speaker's subjective intent to produce lawless action, standing alone, provides a sufficient basis for depriving speech of the protection of the First Amendment without regard to whether the speech at issue both overtly advocates imminent lawless action and also is likely to produce such action.

2. Whether the court below erred in holding that conclusory allegations of a speaker's subjective intent to produce lawless action are sufficient to satisfy the intent element of the exception to First Amendment protection announced in *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

PARTIES TO THE PROCEEDINGS

Petitioners include the following entities and individuals:

Time Warner Entertainment Company, L.P.;

Time Warner, Inc.;

Alcor Film & TV GMBH & Co. Produktions KG;

Jane & Don Productions, Inc.; and

Oliver Stone.

In addition, the following entities and individuals were parties to the proceedings in the Court of Appeal of Louisiana:

Estate of Patsy Ann Byers;

Lonnie Wayne Byers, individually, and on behalf of his children, Jacob Eugene Byers, Joshua Noah Byers and Ladonna Marie Byers.

RULE 29.6 STATEMENT

Time Warner Entertainment Co. L.P. ("TWE") is a limited partnership. The general partners of TWE are American Television and Communications Corporation and Warner Communications Inc., both of which are wholly owned subsidiaries of Time Warner, Inc. The limited partners of TWE are Time Warner Companies, Inc. and TW/TAE, Inc., which are subsidiaries of Time Warner, Inc. and MediaOne Group, Inc. (formerly known as U.S. West Media Group). TWE has no non-wholly owned subsidiaries.

Time Warner, Inc., a publicly traded corporation, has no parent company and no publicly traded subsidiaries. Time Warner, Inc.'s non-wholly owned, non-publicly traded subsidiaries include: Bennie Benjamin Music, Inc., Chatham Music Corp., Hank Snow Music, Inc., Pamela

Music Inc., Rodart Music Corp., and Shubert Music Publishing Corp.

Alcor Film & TV GMBH & Co. Produktions KG has no non-wholly owned subsidiaries. Its parent corporation is Scriba Film Holding GMBH & Co. KG.

Jane & Don Productions, Inc., has no parent corporation or non-wholly owned subsidiaries.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

RULE 29.6 STATEMENT ii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISION INVOLVED 1

STATEMENT OF THE CASE 1

A. Factual Background and Proceedings Below 2

B. How The Federal Question Was Presented 6

C. The Judgment Below Is Final For Purposes Of This Court's Jurisdiction Under 28 U.S.C. § 1257(a) 7

REASONS FOR GRANTING THE WRIT 8

I. The Decision Below Conflicts With Precedents Of This And Other Courts By Eliminating The Requirements That Speech Must Advocate Imminent Lawless Action And Be Likely To Produce That Result Before It Will Fall Within The *Brandenburg* Exception 10

A. The Rule Of Law Applied By The Court Below Is Irreconcilable With *Brandenburg* And Subsequent Decisions Of This Court 10

B. The Decision Below Is Directly Inconsistent With The Holdings Of Numerous Federal And State Appellate Courts 13

1. The Overt Advocacy Requirement 14

2. The Imminence Requirement 16

3. The Likelihood Requirement 18

4. *Brandenburg's* Applicability at the Pleadings Stage 19

II. The Decision Below Is Irreconcilable With Decisions Holding That The *Brandenburg* Exception Requires Objective Manifestations Of Intent Rather Than A Purely Subjective Analysis 22

III. This Court's Immediate Review Is Essential In Order To Avoid The Substantial Chilling Of Protected Speech That Will Otherwise Result From The Decision Below 24

CONCLUSION 28

APPENDIX 1a

TABLE OF AUTHORITIES

CASES Page(s)

American Booksellers Ass'n v. Hudnut, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986) 25

Avenue Plaza, L.L.C. v. Falgoust, 676 So. 2d 1077 (La. 1996) 7

Bill v. Superior Court, 187 Cal. Rptr. 625 (Ct. App. 1982) 13,25

Bose Corp. v. Consumers Union, Inc., 466 U.S. 485 (1984) 23,24

Brandenburg v. Ohio, 395 U.S. 444 (1969) 5,9,10,13

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) 7

Davidson v. Time Warner, Inc., 25 Media L. Rep. 1705, 1997 WL 405907 (S.D. Tex. Mar. 31, 1997) 16

DeBardeleben Marine Corp. v. United States, 451 F.2d 140 (5th Cir. 1971) 26

DeFilippo v. National Broadcasting Co., 446 A.2d 1036 (R.I. 1982) 14,18,19,25

Dombrowski v. Pfister, 380 U.S. 479 (1965) 27

Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46 (1989) 8,25

Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Bd. of Culinary Workers, 542 F.2d 1076 (9th Cir. 1976) 26

Herceg v. Hustler Magazine, Inc., 814 F.2d 1017 (5th Cir. 1987) 13,14,15,16

Hess v. Indiana, 414 U.S. 105 (1973) 9,11,22,23

Hydro-Tech Corp. v. Sundstrand Corp., 673 F.2d 1171 (10th Cir. 1982) 20

Kottle v. Northwest Kidney Ctrs., 146 F.3d 1056 (9th Cir. 1998) 20

Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978) 11

Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) 25

McCollum v. CBS, Inc., 249 Cal. Rptr. 187 (Ct. App. 1988) 13,15,17,20,22,23,25,27

NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982) 10,11

National Org. for Women, Inc. v. Scheidler, 510 U.S. 249 (1994) 20

National Org. for Women, Inc. v. Scheidler, 897 F. Supp. 1047 (N.D. Ill. 1995) 17,20

New York Times Co. v. Sullivan, 376 U.S. 254 (1964) 2,25

Olivia N. v. National Broad. Co., 178 Cal. Rptr. 888 (Ct. App. 1981) 14

Oregon Natural Resources Council v. Mohla, 944 F.2d 531 (9th Cir. 1991) 20

Rice v. Paladin, 128 F.3d 233 (4th Cir. 1997), *cert. denied*, 118 S. Ct. 1515 (1998) 12

Texas v. Johnson, 491 U.S. 397 (1989) 11

Waller v. Osbourne, 763 F. Supp. 1144 (M.D. Ga. 1991) 17

Walt Disney Prods. v. Shannon, 276 S.E.2d 580 (Ga. 1981) 14,17,18,19

Watters v. TSR, Inc., 904 F.2d 378 (6th Cir. 1990) 15

Yakubowicz v. Paramount Pictures Corp., 536 N.E.2d 1067 (Mass. 1989) 13,15,18,19

Yuhas v. Mudge, 322 A.2d 824 (N.J. App. 1974) 26

Zamora v. Columbia Broad. Sys., 480 F. Supp. 199 (S.D. Fla. 1979) 17,20,25

CONSTITUTION AND STATUTE

U.S. CONST. amend. I 1

28 U.S.C. § 1257(a) 1,7

SUP. CT. R. 10(c) 13

PETITION FOR A WRIT OF CERTIORARI

Petitioners Time Warner Entertainment Company, L.P., Time Warner, Inc., Alcor Film & TV GMBH & Co. Produktions KG, Jane & Don Productions, Inc., and Oliver Stone respectfully petition this Court for a writ of certiorari to review the judgment of the Court of Appeal of Louisiana, First Circuit, in this case.

OPINIONS BELOW

The opinion of the Court of Appeal of Louisiana (App., *infra*, 1a-20a) is reported at 712 So.2d 681. The order of the Supreme Court of Louisiana denying petitioners' application for writ of certiorari and/or review (App., *infra*, 26a-27a) and the opinion of the Louisiana trial court (App., *infra*, 21a-25a) are not reported.

JURISDICTION

The judgment of the Louisiana court of appeal was entered on May 15, 1998. Petitioners filed a timely application for writ of review in the Supreme Court of Louisiana, which was denied on October 9, 1998. App., *infra*, 26a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the Constitution of the United States provides, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. CONST. amend. I.

STATEMENT OF THE CASE

This case tests a freedom that is at the core of artistic expression: May an artist be forced by the State to explain and defend in court the use of vivid and forceful imagery when life, as it often does, imitates art? May the creator of an intense and violent work of art be sued if an impres-

sionable member of the artist's audience causes damage to others? The court below answered these questions in the affirmative, and in so doing exposed writers, publishers, broadcasters, and motion picture producers to costly, intrusive and chilling litigation whenever it can be alleged in conclusory and unsupported terms that an isolated and unusually susceptible individual inflicted an injury on another based upon an inspiration drawn from the artist's work. The "pall of fear and timidity" thus imposed on those who create dramatic works of art "is an atmosphere in which the First Amendment freedoms cannot survive." *New York Times v. Sullivan*, 376 U.S. 254, 278 (1964).

The decision of the Louisiana court of appeal sets a dangerously low threshold for damage suits against artists for the criminal conduct of alleged imitators. According to that court, litigation may be pursued whenever the injured person merely alleges that the artist "intended to incite" imitators to initiate criminal conduct "shortly after" exposure to the artistic expression. Such a suit may thus proceed based on no more than a naked allegation concerning the artist's state of mind and irrespective of any showing that the imitated work of art actually advocated imminent lawless action and was likely to produce such action.

This Court's immediate review is essential to correct the Louisiana court of appeal's drastic departure from previously settled principles of First Amendment law. That decision undermines First Amendment liberties throughout the Nation, and invites litigation against artists everywhere whenever criminal or demented conduct mimics artistic expression. To avoid the burden, cost and potentially devastating consequences of jury verdicts against unpopular expression, artists will have no choice but to censor repugnant or violent ideas or particularly vivid depictions that might lead to imitation and thus litigation. The Louisiana court of appeal's dangerous and unprecedented decision must be reversed.

A. Factual Background and Proceedings Below

1. Petitioners directed and produced the fictional feature-length film *Natural Born Killers* and distributed it to a worldwide audience. Respondents allege that two criminals, Sarah Edmondson and Benjamin Darrus, "1) repeatedly viewed the movie on videotape, sometimes under the influence of mind-altering drugs; 2) desired to emulate the protagonists of the video by obtaining a gun and ammunition; and 3) began their own reenactment of the 'Mickey and Mallory' story from the film." App., *infra*, 5a-6a. Thereafter, according to respondents, Edmondson and Darrus "got a .38 caliber revolver from [Edmondson's] parents' cabin" and embarked on a crime spree. *Id.* at 33a. Respondents allege that the pair "first murdered a Mississippi cotton gin owner, Bill Savage, and then, after travelling cross-country to Louisiana," they "shot and seriously wounded [respondents' decedent Patsy Byers] during an armed robbery of a . . . convenience store in Ponchatoula, Louisiana." *Id.* at 2a, 33a.

2. Respondents filed suit in Louisiana state court against Edmondson and Darrus seeking damages for the injuries sustained by Byers and her family as a result of the robbery and attempted murder.[1] App., *infra*, 2a. Respondents subsequently added petitioners as defendants, and alleged that petitioners were liable for "distributing a film which they knew or should have known would cause and inspire people such as . . . Edmondson and . . . Darrus, to commit crimes such as the shooting of Patsy Ann Byers." *Id.* at 3a. Respondents also alleged that petitioners were liable "for producing and distributing a film which glorified the type of violence [that Edmondson and Darrus] committed against Patsy Ann Byers by treating individuals who commit such violence as celebrities and heroes." *Id.* at 3a.

---

[1] After being diagnosed with cancer, Patsy Byers subsequently died, and her estate was substituted as a plaintiff. App., *infra*, 2a n.2.

Petitioners moved to dismiss respondents' claims, contending *inter alia* that imposition of a duty on them to prevent the harm inflicted by Edmondson and Darrus "would violate the First Amendment to the United States Constitution." App., *infra*, 4a. Respondents thereafter amended their pleadings to allege that petitioners were liable "for producing and distributing a film . . . which they knew, intended, were substantially certain, or should have known would cause or incite persons such as defendants, Sarah Edmondson, and Benjamin Darrus (via . . . glorification of violent acts) to begin, shortly after repeatedly viewing same, crime sprees such as that which led to the shooting of Patsy Ann Byers." *Id.* at 4a-5a.[2]

The Louisiana trial court dismissed respondents' suit against petitioners. App., *infra*, 21a-25a. Noting that claims like those at issue here "have been almost universally rejected as stating causes of action in the courts of this country," the trial court cited "constitutional free speech provisions . . . under the United States and Louisiana Constitutions" as a basis for concluding that "the law simply does not recognize a cause of action such as that presented in Plaintiffs' petition." App., *infra*, 22a.

3. Respondents appealed to the Louisiana court of appeal, asserting that petitioners' conduct "in creating *Natural Born Killers* is not protected speech" because it falls within the "incitement to imminent lawless activity exception" to the First Amendment's free speech guarantee. App., *infra*, 14a. The court of appeal agreed, and reversed the judgment of the trial court. *Id.* at 19a-20a.

The court of appeal first held that Louisiana law permits film producers and distributors to be held liable for "produc[ing] and releas[ing] a film containing violent imagery which was intended to cause its viewers to imitate

---

[2] Although respondents' allegations in this regard must be presumed true at this stage of the proceedings, petitioners note that they categorically deny these allegations, which are in any event implausible on their face.

the violent imagery." App., *infra*, 11a. The court explained that petitioners had a duty under Louisiana law "to refrain from creating such a film," and that "[t]he breach of this duty would render [petitioners] liable for the damages inflicted on innocent third parties such as Patsy Byers by viewers of the film imitating the violent imagery depicted in the film." *Id.* at 12a.

The court of appeal next rejected petitioners' claim that the First Amendment precludes imposition of liability on a speaker based on nothing more than the speaker's intent in engaging in the challenged speech. App., *infra*, 14a-19a. The court began its analysis by noting this Court's holding in *Brandenburg v. Ohio*, 395 U.S. 444 (1969), to the effect that "[t]he constitutional guarantee of free speech does not permit a state to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." App., *infra*, 15a (citing *Brandenburg*, 395 U.S. at 447).

The court of appeal pointed to respondents' allegation that petitioners "intended to incite viewers of the film to begin, shortly after viewing the film, crime sprees such as the one that led to the shooting of Patsy Byers." App., *infra*, 15a. The court held that this allegation, if true, was sufficient to place respondent's film outside the protections of the First Amendment: "Once [the allegation of petitioners' intent is] accepted as true, the film 'Natural Born Killers,' would fall into the unprotected category of speech directed to inciting or producing imminent lawless action and which is likely to incite or produce such action." *Id.* Thus, the court of appeal held that a speaker's subjective intent to incite lawless action, standing alone, satisfies the separate *Brandenburg* requirements that the challenged speech advocate imminent lawless action and be likely to produce that result. *Id.*; *see also id.* at 19a.

The Supreme Court of Louisiana denied petitioners' timely application for a writ of review, and thereby left intact the court of appeal's judgment. App., *infra*, 26a.

B. How The Federal Question Was Presented

As the court of appeal noted, petitioners specifically argued in the trial court that charging them with a duty to respondents in the circumstances of this case "would violate the First Amendment to the United States Constitution." App., *infra*, 4a. The trial court relied in part on petitioners' First Amendment defense in dismissing respondents' action, citing "constitutional free speech provisions ... under the United States and Louisiana Constitutions" as a basis for its decision. *Id.* at 22a.

The First Amendment issue was also squarely presented and decided in the court of appeal. Petitioners argued that their conduct was entitled to First Amendment protection and did not fall within the *Brandenburg* exception, noting *inter alia* that *Brandenburg* "does not apply if the speech does not encourage immediate lawless action," a standard that was plainly not satisfied here. App., *infra*, 35a. The court of appeal expressly addressed this issue, and concluded that respondents' allegations were sufficient to place petitioners' speech within the unprotected *Brandenburg* exception. App., *infra*, 14a-19a.

Petitioners also raised the First Amendment issue in the Supreme Court of Louisiana, where they argued *inter alia* that respondents' allegations "fail to meet the requirement of *Brandenburg* that the film be *likely* to result in imminent lawless activity," and "fail[] to allege the requisite 'imminence.'" App., *infra*, 43a-44a (emphasis in original). Petitioners also contended that respondents' "conclusory allegation" of intent was not sufficient to state a claim because, under this Court's precedents, "it is not the speaker's subjective intent in the first instance that determines whether the expression is protected, but the objective nature of the speech at issue." *Id.* at 48a. The Supreme Court of Louisiana declined to review the judgment of the court of appeal. *Id.* at 26a.

C. The Judgment Below Is Final For Purposes Of This Court's Jurisdiction Under 28 U.S.C. § 1257(a)

The decision below finally resolves the important questions of First Amendment law that are presented in this petition.[3] Accordingly, the judgment below is sufficiently final under 28 U.S.C. § 1257(a) to permit immediate review by this Court.

In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), this Court identified four categories of cases in which a judgment will be deemed final for purposes of this Court's certiorari jurisdiction even though further proceedings remain to be had in the state courts. The fourth such category involves "those situations where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come." *Id.* at 482-83. In these circumstances, "if a refusal immediately to review the state-court decision might seriously erode federal policy, the Court has entertained and decided the federal issue, which itself has been finally determined by the state courts for purposes of the state litigation." *Id.* at 483.

The fourth *Cox Broadcasting* category is plainly applicable here. The First Amendment questions at issue here have been finally decided by the court below, which held (1) that a speaker's intent to induce imminent lawless ac-

---

[3] The court of appeal's decision became final for purposes of Louisiana law when the Supreme Court of Louisiana denied petitioner's application for a writ of review. *See Avenue Plaza, L.L.C. v. Falgoust*, 676 So. 2d 1077, 1079 (La. 1996).

tion, standing alone, suffices to eliminate the protections of the First Amendment even in the absence of any basis for determining that the speech in question advocated imminent lawless action and was likely to produce such action, and (2) that conclusory allegations of the speaker's intent are sufficient to permit cases of this kind to proceed without regard to whether the plaintiff has identified any objective manifestations of that alleged intent. App., *infra*, 15a, 19a-20a.

"Adjudicating the proper scope of First Amendment protections has often been recognized by this Court as a 'federal policy' that merits application" of the fourth *Cox Broadcasting* category. *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 55 (1989). The decision below plainly raises substantial First Amendment questions, since it throws into doubt the vitality of *Brandenburg*'s objective imminence and likelihood requirements as applied to speech that is alleged to have caused violence. Absent review by this Court, petitioners may yet prevail on other grounds, "thus rendering unnecessary review of the federal issue by this Court," but the pernicious effects of the court of appeal's erroneous ruling would remain intact. Moreover, reversal of the decision below would clearly "be preclusive of any further litigation on the relevant cause of action," because a proper interpretation of the First Amendment and the *Brandenburg* exception would bar any imposition of liability on petitioners for their protected conduct. Accordingly, the judgment below is "final" for purposes of this Court's review.

REASONS FOR GRANTING THE WRIT

The decision below poses a truly grave threat to a wide range of creative expression -- including, but by no means limited to, provocative films that "hold [a] mirror up to nature" and confront us with unsettling truths about the world in which we live. Celebrated and important feature films like *Bonnie and Clyde, Unforgiven, A Clockwork Orange, Saving Private Ryan, The Deer Hunter* and *Boyz N the Hood* would either have to be "toned down" or not

released, regardless of their artistic value, for fear that someone possibly could be injured through an isolated act of allegedly imitative violence. Creative works available to society as a whole would be limited to bland, non-controversial works, gutted to avoid being linked with irresponsible or criminal behavior by unusually impressionable individuals. Until now, every court to consider such claims has rejected them rather than sublimate artistic expression to externally imposed, amorphous standards of gentility.

In *Brandenburg v. Ohio*, this Court made clear that government may not proscribe speech that promotes or incites violent or criminal action unless "such *advocacy* is directed to inciting or producing *imminent* lawless action and is *likely* to incite or produce such action." 395 U.S. at 447 (emphasis added). The decision of the court below is irreconcilable with *Brandenburg* and its progeny, for two reasons.

First, the decision below effectively eliminates *Brandenburg*'s requirements that the challenged speech advocate imminent lawless action and be likely to produce such action. The Louisiana court of appeal permitted this case to proceed without any consideration of whether respondents' allegations were sufficient to establish these clear prerequisites to liability under *Brandenburg*. Second, the holding of the court below conflicts with *Hess v. Indiana*, 414 U.S. 105 (1973), and other appellate decisions by permitting such lawsuits to proceed based on nothing more than conclusory allegations of subjective intent and without requiring any showing of an objective manifestation of intent to induce imminent lawless action.

As a result of these fundamental errors, the decision below threatens to chill the willingness of artists in all media to express explicit, dramatic, or vivid depictions of violent or illegal conduct. The rule of law announced in this case will have serious deleterious consequences for freedom of speech and expression in this Nation, and will necessarily lead to self-censorship as creative individuals seek to avoid costly and burdensome litigation that entails

intrusive and inhibiting discovery into their thought processes and artistic methods. This Court's immediate review is therefore essential in order to minimize the troubling and dangerous consequences of the decision below.

I. The Decision Below Conflicts With Precedents Of This And Other Courts By Eliminating The Requirements That Speech Must Advocate Imminent Lawless Action And Be Likely To Produce That Result Before It Will Fall Within The *Brandenburg* Exception

A. The Rule Of Law Applied By The Court Below Is Irreconcilable With *Brandenburg* And Subsequent Decisions Of This Court

In *Brandenburg v. Ohio*, this Court defined a narrow exception to the general rule that the First Amendment precludes imposition of civil or criminal liability based on the content of speech. *Brandenburg* holds that "advocacy of the use of force or of law violation" is protected by the First Amendment "except where such *advocacy* is directed to inciting or producing *imminent* lawless action and is *likely* to incite or produce such action." *Brandenburg*, 395 U.S. at 447 (emphasis added). Thus, even if objective facts suggest that the speaker intended to incite lawless conduct (*but see* Part II, *infra*), speech does not lose First Amendment protection under *Brandenburg* if the following three prerequisites have not been met: (1) the speech must *advocate* "the use of force or . . . law violation"; (2) the lawless action at issue must be *imminent*; and (3) imminent lawless action must be a *likely* result of the challenged speech.

In the three decades since *Brandenburg* was decided, this Court has repeatedly reemphasized the advocacy, imminence, and likelihood requirements that must be met before a speaker may be held liable under *Brandenburg*. In *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), for example, the record revealed ten actual incidents of violence linked to a speech advocating such vio-

lence. 458 U.S. at 900 n.28, 902-06. The Court nonetheless held that the First Amendment precluded the imposition of liability on the speaker, because the date of each violent incident was either uncertain or was weeks or months from the speech. *Id.* at 928. Likely imminence could not be presumed from a record that did not advert to specific incidents immediately following the speech. *Id.*

Similarly, in *Texas v. Johnson*, 491 U.S. 397 (1989), this Court rejected the assertion that the mere "'potential for a breach of the peace'" caused by the defendant's speech was sufficient to permit imposition of liability. *Id.* at 409. The Court explained that such a holding "would . . . eviscerate our holding in *Brandenburg*. This we decline to do." *Id.* Instead, the Court concluded that the elements of the *Brandenburg* exception had not been established: "[N]o disturbance of the peace actually occurred or threatened to occur," and thus there could be no showing "that a disturbance of the peace was a *likely* reaction" to the defendant's speech. *Id.* at 408 (emphasis added). *Accord, e.g., Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 845 (1978) ("the degree of imminence [must be] extremely high before utterances can be punished"); *Hess v. Indiana*, 414 U.S. 105, 107-08 (1973) (protester's cry that "We'll take the fucking street again" was constitutionally protected because "at worst, it amounted to nothing more than advocacy of illegal action *at some indefinite future time*" and thus did not satisfy *Brandenburg*'s imminence requirement) (emphasis added).

The decision below announces a dramatic departure from the principles enunciated in this Court's cases. In stark contrast with those precedents, the court below held that a speaker's subjective intent to incite lawless action, *in itself*, is sufficient to deprive speech of the protections of the First Amendment. Despite the total absence of any allegations sufficient to support a finding that petitioners' film constitutes *advocacy* of *imminent* lawless action or was *likely* to produce such action, the Louisiana court of appeal held that respondents could overcome the protections of the First Amendment merely by establishing petitioners' subjective "inten[t] to incite viewers of the film to

begin, shortly after viewing the film, crime sprees such as the one that led to the shooting of Patsy Byers." App., *infra*, 15a. In the court of appeal's view, the speakers' supposed subjective intent was sufficient in itself to establish *as a matter of law* that "the film 'Natural Born Killers' would fall into the unprotected category of speech directed to inciting or producing imminent lawless action and which is likely to incite or produce such action." *Id.*; *see also id.* at 19a ("plaintiffs' allegations *of intent* state a cause of action") (emphasis added).[4]

The court of appeal's holding that a speaker's subjective intent provides a sufficient basis for depriving speech of First Amendment protection is impossible to reconcile with *Brandenburg* and its progeny, which clearly articulate the requirements that the speech at issue must constitute *advocacy* of "*imminent* lawless action" and must be "*likely* to incite or produce such action" before liability may be

---

[4] As support for its interpretation of the *Brandenburg* test, the court below relied on *Rice v. Paladin*, 128 F.3d 233 (4th Cir. 1997), *cert. denied*, 118 S. Ct. 1515 (1998), which held that *Brandenburg*'s imminence and likelihood requirements do not apply to speech that is nothing more than an explicit and detailed instruction of how to commit a crime. *See id.* at 262-63 (no First Amendment protection for a book that was, "pure and simple, a step-by-step murder manual, a training book for assassins"); *see also id.* at 244-46 (citing cases upholding criminal convictions of defendants who instructed others how to commit crimes). The *Rice* decision is inapposite. As the *Rice* court itself recognized, the case before it was "unique in the law" because the challenged publication lacked "any even arguably legitimate purpose beyond the promotion and teaching of murder" and amounted to a "palpable exhortation to murder." *Id.* at 267. *Rice* emphasized that the result would have been different had the speech at issue served a legitimate news reporting or entertainment purpose, and described those contexts as involving cases "wholly unlike the one we must decide today." *Id.* at 265-67. Thus, *Rice* provides no support for the decision below, and in fact contains *dicta* that conflict with that decision.

imposed. *Brandenburg*, 395 U.S. at 447 (emphasis added). Under the rule announced below, the speaker's intent is dispositive, and can render the speaker liable for the consequences produced by his speech without regard to whether the record as a whole could support an objective determination that the speech at issue in fact advocated imminent lawless action and was likely to produce such results. That holding threatens to work a dramatic and indefensible expansion of the deservedly narrow *Brandenburg* exception, and resolves "an important federal question in a way that conflicts with relevant decisions of this Court." SUP. CT. R. 10(c). This Court's review is therefore necessary.

B. The Decision Below Is Directly Inconsistent With The Holdings Of Numerous Federal And State Appellate Courts

The decision below is irreconcilable with a long line of lower court precedents holding as a matter of law that the First Amendment precludes the imposition of tort liability for damages allegedly attributable to portrayals of violent or dangerous conduct in a work of entertainment.[5] In

---

[5] *See, e.g., Yakubowicz v. Paramount Pictures Corp.*, 536 N.E.2d 1067, 1070-71 (Mass. 1989) (First Amendment precludes imposition of liability on a movie producer for injuries allegedly inflicted when a filmgoer imitated the violent conduct portrayed in the defendant's movie); *McCollum v. CBS, Inc.*, 249 Cal. Rptr. 187, 193-95 (Ct. App. 1988) (dismissing, on First Amendment grounds, lawsuit alleging that a song glorifying suicide had induced the suicide of one of the singer's listeners); *Herceg v. Hustler Magazine, Inc.*, 814 F.2d 1017, 1021-23 (5th Cir. 1987) (First Amendment precludes imposition of liability on magazine publisher for injuries caused by reader's imitation of dangerous activity depicted and glorified in magazine article); *Bill v. Superior Court*, 187 Cal. Rptr. 625, 629 (Ct. App. 1982) (First Amendment precludes imposition of liability on producers of violent film for foreseeable harms allegedly inflicted by violent filmgoers because "the exposure to liability in such situations

contrast to the rule announced below, numerous other appellate courts have rejected attempts to impose liability on mass media speakers whose speech does not satisfy the overt advocacy, imminence, and likelihood elements of the *Brandenburg* test. The decision below conflicts with these authorities in several crucial respects.

1. The Overt Advocacy Requirement

The decision below conflicts with a number of appellate court decisions holding that the *Brandenburg* exception cannot be satisfied unless the speech at issue is shown to constitute overt *advocacy* of imminent lawless action, rather than merely a favorable presentation or glorification of such conduct.

In *Herceg v. Hustler Magazine, Inc.*, 814 F.2d 1017 (5th Cir. 1987), for example, the Fifth Circuit emphasized the crucial distinction between the supposedly favorable portrayal of lawless conduct, on the one hand, and the explicit advocacy of such conduct that is required under *Brandenburg*. The plaintiff in *Herceg* sought to impose liability on a magazine publisher for the death of a reader who chose to imitate certain dangerous conduct that had been detailed in the magazine. After assuming that the conduct described in the challenged article was illegal under state law, the court held that liability could not be imposed "[e]ven if the article paints in glowing terms the

---

would have a chilling effect upon the selection of subject matter for movies"); *DeFilippo v. National Broad. Co.*, 446 A.2d 1036, 1041-42 (R.I. 1982) (First Amendment bars suit based on injuries attributable to viewer's attempt to imitate dangerous action portrayed in television broadcast); *Walt Disney Prods., Inc. v. Shannon*, 276 S.E.2d 580, 581-83 (Ga. 1981) (same); *Olivia N. v. National Broad. Co.*, 178 Cal. Rptr. 888, 891-94 (Ct. App. 1981) (First Amendment bars attempt to hold broadcaster liable for rape allegedly committed as a result of broadcaster's depiction of similar rape in television drama).

pleasures supposedly achieved by the practice it describes," because "no fair reading of it can make its content advocacy, let alone incitement to engage in the practice." 814 F.2d at 1022-23. *Accord, e.g., Watters v. TSR, Inc.*, 904 F.2d 378, 382 (6th Cir. 1990) ("without actual incitement, First Amendment considerations 'argue against the liability of a publisher for' . . . 'a reader's reactions to a publication . . . .'") (citation omitted).

Similarly, in *Yakubowicz v. Paramount Pictures Corp.*, 536 N.E.2d 1067 (Mass. 1989), the Supreme Judicial Court of Massachusetts held that a fictional film portraying violent conduct was entitled to full First Amendment protection because it did not constitute express incitement: "Although the film is rife with violent scenes, it does not at any point exhort, urge, entreat, solicit, or *overtly* advocate or encourage unlawful or violent activity on the part of viewers." 536 N.E.2d at 1071 (emphasis added). And in *McCollum v. CBS, Inc.*, 249 Cal. Rptr. 187 (Ct. App. 1988), the California court of appeal reached a similar conclusion, holding that the First Amendment protected the defendant's song lyrics glorifying suicide. Conceding that the lyrics expressed the "view that suicide is an acceptable alternative to a life that has become unendurable," the court held as a matter of law that they did not constitute incitement, because "there is nothing in any of [the defendant's] songs which could be characterized as a command to an immediate suicidal act" since the lyrics did not "purport to order or command anyone to any concrete action at any specific time, much less immediately." 249 Cal. Rptr. at 193-94; *see also id.* at 194 (no basis for finding any "*literal commands or directives* to immediate action") (emphasis added).

It is clear that the approach followed in the foregoing cases would have mandated dismissal of respondents' claims here. Nothing in respondents' allegations would support a finding that petitioners' film contains any "overt[] advoca[cy]," "exhort[ation]," or "literal commands" to engage in imminent lawless conduct. Instead, respondents alleged only that petitioners' film "inspired" Edmondson and Darrus to commit their crime because it

"glorified the type of violence [they] committed against Patsy Ann Byers by treating individuals who commit such violence as celebrities and heroes . . . .'" App., *infra*, 3a. In short, just as in *Herceg*, *Yakubowicz*, and *McCollum*, petitioners' film is not an overt incitement to violent action. At most, it might be perceived to be a work of expression that "paints in glowing terms" the conduct it describes. *Herceg*, 814 F.2d at 1022-23. As *Herceg* and the other cases cited above make clear, the First Amendment shields such speech from liability.

2. The Imminence Requirement

The approach followed by the court below is impossible to reconcile with decisions of other state and federal courts holding that *Brandenburg*'s imminence requirement is fully applicable to claims against mass media defendants and must be satisfied before First Amendment immunity will be lost. These cases demonstrate that the imminence requirement imposes a separate defense to liability, regardless of the speaker's subjective intent in disseminating the challenged speech.

Thus, in *Herceg v. Hustler Magazine*, the defendant's magazine article described dangerous conduct that was imitated by a reader, resulting in his death. Despite the jury's finding that the article amounted to an incitement to harmful conduct, the *Herceg* court held that the First Amendment precluded imposition of liability, holding that "[t]he crucial element to lowering the first amendment shield is the *imminence* of the threatened evil," an element that could not be satisfied as a matter of law. 814 F.2d at 1022-23 (emphasis added).[6]

---

[6] Other federal courts have reached the same conclusion. *See, e.g., Davidson v. Time Warner, Inc.*, 25 Media L. Rep. 1705, 1997 WL 405907 at *20-22 (S.D. Tex. Mar. 31, 1997) (even assuming defendant "intended his music to incite imminent, lawless conduct," liability could not be imposed for injuries inflicted by alleged imitator of violent acts portrayed in defendant's music

Similarly, the court in *McCollum v. CBS* rejected as a matter of law the plaintiffs' attempt to impose liability on a music publisher for the suicide of a listener. 249 Cal. Rptr. at 191-94. Noting that one of the prerequisites to application of the *Brandenburg* exception is a showing that the challenged speech was likely to produce "imminent" lawless conduct and that "[s]peech directed to action at some indefinite time in the future will not satisfy this test," the *McCollum* court held that the First Amendment provided a complete defense in the absence of a showing that the defendants' music contained "a command to an *immediate* suicidal act." *Id.* at 193 (emphasis added). *Accord, e.g., Walt Disney Prods. v. Shannon*, 276 S.E.2d 580, 582 n.2 (Ga. 1981) (rejecting imposition of liability under *Brandenburg* for injuries resulting from viewer's imitation of dangerous activity portrayed in television broadcast, because "[t]here is nothing in what the plaintiff was allegedly invited to do here that was '*imminently* lawless'") (emphasis added).

The Louisiana court of appeal, by contrast, effectively read the objective imminence requirement out of the

---

because there was no showing that the illegal conduct "would imminently occur after listening to the album"); *National Org. for Women, Inc. v. Scheidler*, 897 F. Supp. 1047, 1087 (N.D. Ill. 1995) (dismissing incitement claims where the challenged speech did not result in violence within 24 hours, because "[e]ncouraging activity which was not immediately followed by violence is protected by the First Amendment"); *Waller v. Osbourne*, 763 F. Supp. 1144, 1150, 1151 n.15 (M.D. Ga. 1991) (dismissing incitement action against producers of recorded music where there were no allegations that violent conduct was committed "immediately after listening to defendant's music," because the "primary focus" of the *Brandenburg* inquiry is "on the imminence of the threat"); *see also Zamora v. Columbia Broad. Sys.*, 480 F. Supp. 199, 206 (S.D. Fla. 1979) (emphasizing that incitement claim against media defendant requires that speech be "immediately acted on").

Brandenburg exception. As demonstrated in part I.A above, the court held as a matter of law that respondents' conclusory allegation of petitioners' subjective *intent* to induce violence "shortly after" viewing *Natural Born Killers* eliminated the need to offer any objective basis for a determination that the film did in fact constitute an incitement to "imminent" lawless action. This failure to enforce *Brandenburg*'s separate "imminence" requirement is particularly striking in the circumstances presented here, because it is clear from the record that the imminence requirement cannot possibly be satisfied. Indeed, far from alleging that the violence at issue occurred immediately after the viewing of the film, respondents concede that after "repeatedly" viewing petitioners' film -- a fact in itself wholly at odds with imminence -- Edmondson and Darrus traveled through Mississippi, stopped to commit a crime there, and only then proceeded "cross-country" several hundred miles to southern Louisiana before committing the separate crime at issue here. App., *infra*, 33a.

3. The Likelihood Requirement

The Louisiana court of appeal's decision also conflicts with rulings of other appellate courts by refusing to require an objective *likelihood* of lawless action as a prerequisite to the loss of First Amendment protection. A number of state appellate courts have held that claims like those asserted by respondents cannot satisfy *Brandenburg*'s likelihood requirement when the challenged speech was disseminated to a nationwide audience without resulting in widespread acts of violence.

In both *DeFilippo v. National Broadcasting Co.*, 446 A.2d 1036 (R.I. 1982), and *Walt Disney Productions v. Shannon*, 276 S.E.2d 580 (Ga. 1981), for example, the courts addressed instances of broadcast media defendants who portrayed dangerous conduct as part of works of entertainment and were then sued as a result of damages suffered by viewers who were alleged to have imitated that conduct. In both cases, the courts held that liability could not be imposed because the "likelihood" or "clear and present danger" requirement could not be satisfied where only

a single incident had been alleged to arise out of a broadcast seen by a large audience. *See DeFilippo*, 446 A.2d at 1041; *Shannon*, 276 S.E.2d at 583 & n.4. As the *DeFilippo* court explained, "[Plaintiff's decedent] was, as far as we are aware, the only person who is alleged to have emulated the action portrayed in [defendant's television broadcast] .... In such a case, we cannot say that the broadcast constituted an incitement." 446 A.2d at 1041. *Accord Shannon*, 276 S.E.2d at 583 (holding that even where injury was foreseeable, the challenged speech could not be said to pose "a clear and present danger of injury" where "of an estimated 16 million children watching this program, only the plaintiff in this case reported an injury"). *See also Yakubowicz v. Paramount Pictures Corp.*, 536 N.E.2d at 1071 (rejecting claim against producer of film that did not "create the *likelihood* of inciting or producing 'imminent lawless action'") (emphasis added).

In the decision below, by contrast, the Louisiana court failed to require any objective basis for a determination that *Natural Born Killers*, which was viewed by millions, was likely to incite imminent lawless action. Respondents never alleged that the distribution and presentation of petitioners' film resulted in widespread outbreaks of violence. Under *DeFilippo* and *Shannon*, petitioners would have been entitled to judgment as a matter of law by virtue of respondents' failure to offer any basis for a finding that imminent lawless action was objectively likely to result from the dissemination of petitioners' film.

4. *Brandenburg*'s Applicability at the Pleadings Stage

The Louisiana court of appeal attempted to distinguish some of the authorities discussed above on the ground that they involved decisions at summary judgment or after a trial. App., *infra*, 12a-13a. In the court of appeal's view, apparently, the First Amendment provides no shield against forcing speakers to bear the expense and burden of full-blown litigation, including intrusive discovery into their artistic methods, as long as plaintiffs are willing to

make the most cursory of allegations regarding the speakers' subjective intent.

Contrary to the court of appeal's reasoning, however, the principles announced by the precedents discussed above are fully applicable at every stage of the litigation process. Indeed, courts have uniformly rejected claims like those asserted by respondents without regard to whether they arise at the pleadings stage, on summary judgment, or at trial. *See, e.g., McCollum*, 249 Cal. Rptr. at 191-95 (dismissing case at pleadings stage under *Brandenburg*); *National Org. for Women, Inc. v. Scheidler*, 897 F. Supp. at 1083-89 (striking allegations of complaint at pleadings stage on First Amendment grounds); *Zamora v. Columbia Broad. Sys.*, 480 F. Supp. 199 (S.D. Fla. 1979); *see generally* notes 5-6, *supra*.

Moreover, the court of appeal's rationale is impossible to reconcile with the principle that the First Amendment imposes a heightened pleading requirement on plaintiffs seeking to impose liability on presumptively protected conduct. As the Ninth Circuit has emphasized, "when 'a plaintiff seeks damages . . . for conduct which is prima facie protected by the First Amendment, the danger that the mere pendency of the action will chill the exercise of First Amendment rights requires more specific allegations than would otherwise be required.'" *Kottle v. Northwest Kidney Ctrs.*, 146 F.3d 1056, 1063 (9th Cir. 1998) (citation omitted). *Accord, e.g., Hydro-Tech Corp. v. Sundstrand Corp.*, 673 F.2d 1171, 1177 n.8 (10th Cir. 1982) (same). Justice Souter has noted this line of cases with approval, citing another court of appeals decision, *Oregon Natural Resources Council v. Mohla*, 944 F.2d 531 (9th Cir. 1991), as "applying a heightened pleading standard to a complaint based on presumptively protected First Amendment conduct." *National Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 264-65 (1994) (Souter, J., joined by Kennedy, J., concurring). The decision below is impossible to reconcile with this doctrine.

Even leaving aside the heightened pleadings requirement applicable in First Amendment cases, the decision

below cannot be defended on the ground that it arises at the pleadings stage. It was only by adopting a rule of law that eviscerates the *Brandenburg* test that the Louisiana court of appeal was able to save respondents' claims from dismissal. The decision below rests not on any procedural niceties peculiar to the pleadings stage, but rather on the court of appeal's glaringly incorrect conclusion that subjective intent to incite lawless action, standing alone, suffices to demonstrate the applicability of the *Brandenburg* exception.

The effect of this exclusive and patently erroneous focus on the speaker's subjective intent is to bring within the realm of actionable incitement allegations which are, on their face, insufficient to satisfy the other, purely objective, elements of the *Brandenburg* exception (*i.e.*, the requirements that the speaker *advocate imminent* lawless action and that such action be a *likely* consequence of the challenged speech). Thus, the rule of law announced by the court of appeal permits this action to proceed even though respondents' allegations contain no basis for concluding that petitioners' speech advocated or was likely to result in imminent lawless action. Indeed, respondents conceded that after the perpetrators in this case had "repeatedly" viewed the film, they traveled through Mississippi, committed a separate crime there, and then traveled on to southern Louisiana before allegedly being "incited" to commit the lawless action at issue here. App., *infra*, 33a. Furthermore, respondents never made allegations sufficient to support an objective finding that petitioners' film in fact advocated imminent lawless action and was likely to result in such conduct. Under these circumstances, the decision below is impossible to defend on any ground consistent with the authorities cited above.

* * * * *

The foregoing discussion amply demonstrates that the decision below reflects a fundamental disagreement with the First Amendment analysis applied by this Court and by numerous other courts in functionally indistinguishable circumstances. The questions presented here arise with

considerable frequency, and until now the lower courts have had little difficulty enforcing the dictates of the First Amendment in a consistent manner. As one court put it, "the claim that certain fictional depictions in the film or electronic media have incited unlawful conduct, and should result in the imposition of tort liability, is by no means novel. However, all such claims have been rejected on First Amendment grounds." *McCollum*, 249 Cal. Rptr. at 194. The decision below throws this previously settled and important area of the law into uncertainty and confusion. This Court's review is therefore essential, because only by granting certiorari and reversing the judgment below can this Court make clear that *Brandenburg*'s requirements of overt advocacy, objective imminence, and actual likelihood retain independent validity as shields against tort claims predicated on the expressive content of a mass media speaker's allegedly dangerous speech.

II. The Decision Below Is Irreconcilable With Decisions Holding That The *Brandenburg* Exception Requires Objective Manifestations Of Intent Rather Than A Purely Subjective Analysis

The court below held that respondents' complaint satisfied the "intent" requirement of the *Brandenburg* test because it alleged, in wholly conclusory terms, that petitioners subjectively "intended" to cause viewers to begin crime sprees. App., *infra*, 4a-5a. This holding is directly inconsistent with decisions of this Court and other courts rejecting similarly conclusory allegations or findings of subjective intent and making clear that *Brandenburg*'s intent requirement cannot be satisfied in the absence of objective manifestations of the defendant's intent.

In *Hess v. Indiana*, 414 U.S. 105 (1973), for example, the lower state courts expressly found that the defendant's exhortation to "take the fucking street again" was "'intended to incite further lawless action on the part of the crowd in the vicinity of [the defendant] and was likely to produce such action.'" *Id.* at 108. Despite this factual finding regarding the defendant's subjective intent, this Court had little difficulty concluding that the *Brandenburg*

test had not been satisfied, because "there was no evidence or rational inference from the import of the language, that his words were intended to produce, and likely to produce, imminent disorder." *Id.* at 109 (emphasis added). Under *Hess*, therefore, it is clear that mere allegations or findings of subjective intent will not suffice to satisfy *Brandenburg*'s intent requirement. Only where "the import of the language" actually used by the defendant is itself sufficient to establish the requisite intent can this aspect of the *Brandenburg* test be satisfied. *Id.*

Similarly, in *McCollum v. CBS, Inc.*, the court held that *Brandenburg* and the First Amendment required dismissal of a complaint alleging that an individual had died as a result of song lyrics advocating suicide. The court rejected as legally insufficient the allegation that the defendants "'intentionally aided and/or advised and/or encouraged another person to commit . . . suicide,'" explaining that these "general conclusionary allegations" were insufficient as a matter of law. 249 Cal. Rptr. at 197 n.12. Instead, after making clear that the decedent's death "must have been a specifically intended consequence" in order to satisfy the *Brandenburg* test, the court conducted an objective review of the speech challenged by the plaintiffs and made an independent determination that "w[e] can find no such intent . . . here." *Id.* at 193.

The foregoing precedents follow directly from this Court's admonition that "an appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'" *Bose Corp. v. Consumers Union, Inc.*, 466 U.S. 485, 499 (1984). As the *Bose* Court made clear, moreover, that duty of independent review "cannot be delegated to the trier of fact." *Id.* at 501. And of course, it is beyond dispute that the requirement of independent review is fully applicable in the *Brandenburg* context, and mandates an independent judicial determination of the question whether the speaker intended to induce imminent lawless action. *See id.* at 505-06 (citing *Hess v. Indiana* for the proposition that "[w]e have exercised independent

judgment on the question . . . whether advocacy is directed to inciting or producing imminent lawless action").[7]

By refusing to apply its independent judgment to the allegations set forth by respondents here, and by abdicating its judicial responsibility to require objective manifestations of intent rather than mere conclusory allegations, the court below has created a conflict with the foregoing decisions and has undermined the protections afforded by the First Amendment. This Court's review is warranted to resolve the conflict and clarify the obligations of appellate courts faced with attacks on protected speech.

III. This Court's Immediate Review Is Essential In Order To Avoid The Substantial Chilling Of Protected Speech That Will Otherwise Result From The Decision Below

If permitted to stand, the decision below will allow a single State to discourage production of disfavored types of films for exhibition anywhere in the United States. The Louisiana court's decision greatly expands the potential liability, and the potential for litigation, faced by any author, filmmaker, or distributor of speech that recounts or describes violent or criminal activity. As a result, the decision below will inevitably chill protected speech.

As this Court has recognized, one reason to exercise its plenary review is "to confine the perimeters of any unprotected category [of speech] within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited." *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 505 (1984). "[I]t would be in-

---

[7] As the court of appeal noted (App., *infra*, 13a), petitioners' film was not before the court at the pleadings stage. That fact is irrelevant, however. Even on a challenge to respondents' claims based on the pleadings alone, the court was obligated to conduct a searching and independent review of respondents' allegations to determine whether those allegations were sufficient to satisfy *Brandenburg* and *Hess*. And of course they were not.

tolerable to leave unanswered, under these circumstances, an important question of freedom of the press under the First Amendment." *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 56 (1989) (quoting *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 247 n.6 (1974). "[A]n uneasy and unsettled constitutional posture" for the *Brandenburg* test "could only further harm the operation of a free press." *Id.*

Numerous courts have recognized the dangers to free expression that *Brandenburg* was intended to prevent and that will inevitably result from adherence to the opinion below. A rule of law permitting plaintiffs to recover for injuries allegedly attributable to isolated mimicry of a broadly disseminated work of fiction "would invariably lead to self-censorship by broadcasters in order to remove any matter that may be emulated and lead to a law suit." *DeFilippo*, 446 A.2d at 1041. *Accord, e.g., McCollum*, 249 Cal. Rptr. at 195 ("Musical composers and performers, as well as record producers and distributors, would become significantly more inhibited in the selection of controversial materials if liability for civil damages were a risk to be endured for the publication of protected speech."); *Bill v. Superior Court*, 187 Cal. Rptr. at 629 (holding film producers liable for the effect of their speech on violence-prone persons "would have a chilling effect upon the selection of subject matter for movies"); *Zamora*, 480 F. Supp. at 206 (to permit claims arising from "an untoward reaction on the part of any 'susceptible' person" would "give birth to a legal morass though which broadcasting would have difficulty finding its way"). As the Seventh Circuit has explained, "a state may not penalize speech that does not cause immediate injury" because "a law awarding damages for assaults caused by speech has the power to muzzle the press." *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323, 333 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986). "[T]he pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive." *New York Times Co. v. Sullivan*, 376 U.S. 254, 278 (1964).

Similarly, this Court has repeatedly observed that fear of the burdens and risks of litigation will inevitably spur self-censorship in the absence of vigorous judicial enforcement of First Amendment principles. Writers, directors, and other speakers will have no choice but to reexamine and modify their speech in order to avoid the risk of substantial and unjustified damage awards if this Court does not act expediently to reject the legal standard announced below. *See New York Times v. Sullivan*, 376 U.S. at 279 ("[t]he fear of damage awards . . . may be markedly more inhibiting than the fear of prosecution under a criminal statute"). This is particularly so for mass communications. As one court has noted in the print context, "the usual publishers of newspapers, treatises, and maps lack the financial resources to compensate an indeterminate class who might read their work. Potential liability would have a staggering deterrent effect on potential" speakers. *DeBardeleben Marine Corp. v. United States*, 451 F.2d 140, 148 (5th Cir. 1971). To impose a broad legal duty of the kind sought here upon mass media defendants "would not only be impractical and unrealistic, but would have a staggering effect on the commercial world and our economic system." *Yuhas v. Mudge*, 322 A.2d 824, 825 (N.J. App. 1974).

In addition to the inevitable chilling effect caused by the fear of damage awards, the decision below also creates a powerful incentive for writers and directors to modify their creative behavior to avoid the type of intrusive and burdensome discovery necessarily contemplated by the standard articulated below. As the Ninth Circuit recognized in *Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Bd. of Culinary Workers*, 542 F.2d 1076 (9th Cir. 1976), conditioning liability for First Amendment activity "on the motivations" of the defendant would inevitably have "a chilling effect on exercise of" expressive rights. *Id.* at 1082. In particular, the court recognized that allowing a meritless lawsuit to "drag on through the discovery stage" may induce the party exercising First Amendment rights "to forego presenting its views." *Id.* As the *McCollum* court recognized in affirming the dis-

missal of an incitement complaint, "[t]he trial court was . . . correct in bringing this action to a prompt end. Because unnecessarily protracted litigation would have a chilling effect upon the exercise of First Amendment rights, speedy resolution of cases involving free speech is desirable." 249 Cal. Rptr. at 198.

Absent plenary review by this Court at this stage of the litigation, the creative world will soon be treated to the spectacle of a respected and innovative film director being subjected to extensive discovery into his creative thought processes, all in furtherance of the lower court's erroneous and single-minded focus on the speaker's subjective intent. It is difficult to imagine a more dangerous judicially sanctioned assault on the sanctity of free speech and artistic license than that authorized by the decision below.

For all these reasons, this Court should exercise its discretion to grant review immediately in this case, without permitting the further harm to First Amendment interests that will necessarily ensue if the decision below is allowed to stand. Immediate review is essential here to "avoid[] making vindication of freedom of expression await the outcome of protracted litigation." *Dombrowski v. Pfister*, 380 U.S. 479, 487 (1965). The Court should act now to prevent the "chilling effect upon the exercise of First Amendment rights" of other publishers, authors, and filmmakers that will inevitably result "from the fact of the [ongoing] prosecution" of these defendants. *Id.*

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

JACK M. WEISS
MARK B. HOLTON
AMY L. NEUHARDT
GIBSON, DUNN & CRUTCHER LLP
200 Park Avenue
New York, NY 10166
(212) 351-4000

THEODORE B. OLSON
Counsel of Record
THOMAS G. HUNGAR
JOSEPH D. MATAL
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Counsel for Petitioner

January 6, 1999

APPENDIX

APPENDIX A

Patsy Ann BYERS, et al.
v.
Sarah EDMONDSON, et al.
No. 97 CA 0831.
Court of Appeal of Louisiana,
First Circuit.
May 15, 1998.

A shooting victim brought an action for negligence and intentional tort against, among others, the producers of a movie and videotape that the shooter had allegedly viewed shortly before beginning the crime spree that included the shooting. The Twenty-First Judicial District Court, Parish of Tangipahoa, No. 9502213, Robert H. Morrison, III, J., dismissed the claim. The victim appealed. The Court of Appeal, Carter, J., held that: (1) the victim stated a cause of action for intentional tort against the producers of the movie, and (2) the allegations of the petition brought the case into the exception to the First Amendment for incitement to imminent lawless activity.

Reversed and remanded.

Fitzsimmons, J., assigned additional reasons.

Before CARTER and FITZSIMMONS, JJ., and CHIASSON,[1] J. Pro Tem.

CARTER, Judge.

This is an appeal from a trial court judgment dismissing a negligence and intentional tort claim on a peremptory exception raising the objection of no cause of action.

---

1 Judge Remy Chiasson, retired, is serving as judge pro tempore by special appointment of the Louisiana Supreme Court

FACTS

This suit arises from the shooting of plaintiff, Patsy Byers (Byers) by Sarah Edmondson (Edmondson) and Benjamin Darrus (Darrus). According to the allegations of Byers'[2] petition, Edmondson and Darrus acted together when Edmondson shot and seriously wounded Byers during an armed robbery of a Time Saver convenience store in Ponchatoula, Louisiana. Darrus accompanied Edmondson upon the shooting spree, encouraged her to engage in the shooting spree and assisted Edmondson by driving her to and from the armed robbery and shooting. Neither Edmondson nor Darrus attempted to obtain medical assistance for Byers after shooting her. The shooting, which took place on March 8, 1995, rendered Byers a paraplegic.

On July 26, 1995, Byers filed suit against Edmondson and Darrus for the damages sustained by Byers and her family as a result of the armed robbery and shooting. In early March 1996, Byers filed a first supplemental and amending petition for damages, adding Edmondson's parents and several insurance companies as defendants. In this petition, Byers alleged that the gun used in the shooting was obtained from a cabin owned by Edmondson's parents.

On the same date, Byers filed a second supplemental and amending petition for damages, through which she named Warner Home Video, Inc., Warner Brothers, Inc., Time Warner Entertainment Company, L.P., Time Warner, Inc., Regency Enterprises,[3] Alcor Films, J.D. Productions and Oliver Stone as addi-

---

2 This petition was filed on behalf of Patsy Byers, her husband and their three children. While this appeal was pending, Patsy Byers died. Her estate has been substituted as a plaintiff in her petition. For purposes of this appeal, we will refer to all of the plaintiffs collectively as Byers.

3 Byers subsequently obtained an order which voluntarily dismissed Regency Enterprises from the suit without prejudice.

tional defendants. Byers restated the same prior allegations with respect to the occurrence of the shooting and the obtaining of the weapon used in the shooting. The new allegations asserted that Edmondson and Darrus "went upon a crime spree culminating in the shooting and permanent injury to Patsy Ann Byers as a result of seeing and becoming inspired by the movie 'Natural Born Killers' produced, directed and distributed by the Hollywood defendants."[4] The amended petition further alleged that "[a]ll of the Hollywood defendants are liable, more particularly, but not exclusively for, distributing a film which they knew or should have known would cause and inspire people such as ... Edmondson and ... Darrus, to commit crimes such as the shooting of Patsy Ann Byers, and for producing and distributing a film which glorified the type of violence [Edmondson and Darrus] committed against Patsy Ann Byers by treating individuals who commit such violence as celebrities and heroes, as well as for such other negligence as will be learned during discovery and shown at trial of this matter."

On September 25, 1996, defendant Time Warner Entertainment Company, L.P. (TWEC), filed a motion to strike any references to Warner Home Video, Inc., and Warner Brothers, Inc., as defendants. TWEC contended that these two entities were unincorporated divisions of TWEC, which was already a named defendant in the suit.[5] On this same date, Time Warner, Inc., filed a declinatory exception raising the objection of lack of personal jurisdiction

---

4 The Hollywood Defendants are the same defendants who will be subsequently identified as the Warner Defendants.

5 The reasons for judgment issued in conjunction with the trial court's ruling on the peremptory exceptions raising the objections of no cause of action indicate that "[o]ther pending exceptions were deferred until the rulings on the present issues." The record does not otherwise reflect the disposition of this motion to strike.

and a peremptory exception raising the objection of no cause of action. Additionally, TWEC, Alcor Film & TV GMBH & Co. Produktions KG, Jane and Don Productions Inc., and Oliver Stone (the Warner defendants)[6] filed their own peremptory exception raising the objection of no cause of action on September 25, 1996. In the exception, the Warner defendants asserted that they owed no duty to plaintiffs to ensure that none of the viewers of the movie would decide to imitate actions depicted in the fictional film. The Hollywood defendants also denied that they owed a duty to prevent harm inflicted by others absent a "special relationship" obligating the defendant to protect the plaintiff from such harm. They further asserted that imposition of such a duty would violate the First Amendment to the United States Constitution and Article 1, Section 7 of the Louisiana Constitution. A hearing on the exception was set for December 16, 1996.

A week before the hearing, on December 9, 1996, Byers filed a third supplemental and amending petition for damages through which she added and supplemented the allegations with respect to the actions and liability of the Warner defendants. Paragraph 1 of plaintiffs' third supplemental and amending petition for damages provides:

> Plaintiffs desire to supplement and amend paragraph V.(E). of their Petition to read as follows:
>
> V.(E).
>
> All of the Hollywood defendants are liable, more particularly, but not exclusively:
>
> A) for producing and distributing a film (and marketing same on videotape) which they knew, intended, were substantially certain, or should

---

6 In this exception, the Warner Defendants stated that Jane and Don Productions, Inc., was incorrectly named in the petition as J.D. Productions; and that Alcor Film & TV GMBH & Co. Produktions KG was incorrectly named in the petition as Alcor Films.

> have known would cause or incite persons such as defendants, Sarah Edmondson, and Benjamin Darrus (via subliminal suggestion or glorification of violent acts) to begin, shortly after repeatedly viewing same, crime sprees such as that which led to the shooting of Patsy Ann Byers; B) for negligently and/or recklessly failing to take steps to minimize violent content of the video or to minimize glorification of senselessly violent acts and those who perpetrate such conduct; C) by intentionally, recklessly, or negligently including in the video subliminal images which either directly advocated violent activity or which would cause viewers to repeatedly view the video and thereby become more susceptible to its advocacy of violent activity;[7] D) for negligently and/or recklessly failing to warn viewers of the potential deleterious effects upon teenage viewers caused by repeated viewing of the film/video and of the presence of subliminal messages therein; and E) as well as for other such intentional, reckless, or negligent acts will [sic] be learned during discovery and shown at trial of this matter.

Two days later, Byers filed a memorandum opposing the Warner defendants' exceptions raising the objection of no cause of action. In this opposition, Byers asserted that Edmondson and Darrus 1) repeatedly viewed the movie on videotape, sometimes under the influence of mind-altering drugs; 2) desired to emulate the protagonists of the video by obtaining a gun and ammunition; and 3) began their own reenactment of the "Mickey and Mallory" story from

---

[7] At oral argument, counsel for Byers acknowledged that he had to abandon the subliminal message allegations in the petition because an examination of the "Natural Born Killers" video by Byers' expert failed to reveal the presence of the type of subliminal messages alleged in the petition. Thus, for purposes of this appeal, we will ignore the subliminal message allegations contained in the petition.

the film, resulting in the murder of a Mississippi cotton gin owner and brutal attempted murder of Patsy Byers.

On the morning of the hearing, the Warner defendants filed a reply memorandum, noting that a similar claim filed in Georgia against the Warner defendants as a result of a Georgia murder by a couple who was allegedly imitating the actions of the characters "Mickey and Mallory" from "Natural Born Killers," had recently been dismissed for the failure to state a cause of action. Subsequently, on December 23, 1996, defendant Time Warner, Inc., filed a declinatory exception of lack of jurisdiction and a peremptory exception raising the objection of no cause of action in response to Byers' third supplemental and amending petition.

After taking the matter under advisement, the trial court granted the peremptory exceptions raising the objection of no cause of action, finding that the "law simply does not recognize a cause of action such as that presented in [Byers'] petition." Because counsel for Byers did not contend Byers could otherwise amend the petition to attempt to state any other cause of action as against the Warner defendants, the court did not grant leave to amend. A judgment was signed on January 23, 1997, sustaining the peremptory exceptions raising the objection of no cause of action and dismissing Byers' suit as to those claims against the Warner defendants.[8] Byers filed a motion for new trial, which was denied by the trial court.[9]

---

8 Specifically, the judgment dismissed the suit as to Byers' claims against defendants TWEC, Alcor Film & TV GMBH & Co. Produktions KG, Jane and Don Productions, Inc., Oliver Stone and Time Warner, Inc. The judgment did not mention the dismissal of Warner Home Video or Warner Brothers, Inc.

9 Byers included a copy of the "Natural Born Killers" video with her motion for new trial in the event the court determined a duty was owed, but still had to reach the constitutional question of protection under the First Amendment. This video is attached as an exhibit to the

Byers appealed the judgment of the trial court, assigning as error the trial court's finding that Byers' cause of action was proscribed by Louisiana law and United States and Louisiana constitutional guarantees of free speech.

PEREMPTORY EXCEPTION RAISING OBJECTION OF NO CAUSE OF ACTION

The objection of no cause of action is properly raised by the peremptory exception. The exception of no cause of action questions "whether the law extends a remedy to anyone under the factual allegations of the petition." *Louisiana Paddlewheels v. Louisiana Riverboat Gaming Commission*, 94-2015, p. 5, n. 3 (La.11/30/94), 646 So.2d 885, 888, n. 3; *Treasure Chest Casino, L.L.C. v. Parish of Jefferson,* 96-1010, p. 5 (La.App. 1st Cir. 3/27/97), 691 So.2d 751, 754, writ denied, 97-1066 (La.6/13/97), 695 So.2d 982. The purpose of an exception pleading the objection of no cause of action is to determine the sufficiency in law of the petition. *City of New Orleans v. Board of Commissioners of Orleans Levee District*, 93-0690, p. 2 (La.7/5/94), 640 So.2d 237, 241; *Treasure Chest Casino, L.L.C. v. Parish of Jefferson*, 691 So.2d at 754.

---

record on appeal. However, we will not consider the video since evidence is generally not admissible on an exception raising the objection of no cause of action unless the pleadings are expanded through the admission of the evidence by the trial court without objection from the other party. *Treasure Chest Casino, L.L.C. v. Parish of Jefferson*, 96-1010, p. 5 (La.App. 1st Cir. 3/27/97), 691 So.2d 751, 754, writ denied, 97-1066 (La.6/13/97), 695 So.2d 982. In the present case, there is nothing in the record to indicate that the video was admitted into evidence by the trial court. Additionally, in their brief, the Warner defendants contend that the video is improperly part of the record; thus, it is apparent that if plaintiff had attempted to introduce the video at the hearing, the attempt would have been met with an objection from the Warner defendants.

Generally, no evidence may be introduced to support or controvert the exception. *Treasure Chest Casino, L.L.C. v. Parish of Jefferson*, 691 So.2d at 754. However, as set forth in *City National Bank of Baton Rouge v. Brown*, 599 So.2d 787, 789 (La.App. 1st Cir.), writ denied, 604 So.2d 999 (La.1992), the jurisprudence recognizes an exception to this rule, which allows the court to consider evidence which is admitted without objection to enlarge the pleadings. *Treasure Chest Casino, L.L.C. v. Parish of Jefferson*, 691 So.2d at 754. Otherwise, the exception is triable on the face of the pleadings, and, for the purposes of determining the issues raised by the exception, the well-pleaded facts in the petition must be accepted as true. *City of New Orleans v. Board of Commissioners of Orleans Levee District*, 640 So.2d at 241; *Treasure Chest Casino, L.L.C. v. Parish of Jefferson*, 691 So.2d at 754. The court must determine if the law affords plaintiff a remedy under those facts. *Treasure Chest Casino, L.L.C. v. Parish of Jefferson*, 691 So.2d at 754.

When a petition states a cause of action as to any ground or portion of the demand, an exception raising the objection of no cause of action must be overruled. Any doubts are resolved in favor of the sufficiency of the petition. *Treasure Chest Casino, L.L.C. v. Parish of Jefferson*, 691 So.2d at 755.

When the grounds of the objection pleaded by the peremptory exception may be removed by amendment of the petition, the judgment sustaining the exception shall order such amendment within the delay allowed by the court. If the grounds of the objection cannot be so removed, or if plaintiff fails to comply with the order to amend, the action shall be dismissed. LSA-C.C.P. art. 934. Clearly, even if a petition fails to state a cause of action, if the grounds of the objection can be removed by amendment, the plaintiff should be allowed to amend his demand. However, where the grounds for the objection cannot be removed by amendment, the trial court is not required to allow the pleadings to be amended. *Treasure Chest Casino, L.L.C. v. Parish of Jefferson*, 691 So.2d at 755. The decision to allow amendment is within the sound discretion of the trial

court. *Prudential Insurance Company of America v. CC & F Baton Rouge Development Company*, 93- 2074, p. 13 (La.App. 1st Cir. 10/7/94), 647 So.2d 1131, 1139.

In resolving the issue of whether Byers has a cause of action against the Warner defendants for the shooting, we must determine if the Warner defendants owed a duty to Byers to prevent her from being shot by two people who viewed "Natural Born Killers" and went on a crime spree shortly thereafter. If we find that such a duty exists under Louisiana law, we must further decide whether the imposition of such a duty violates the guarantee of free speech contained in the First Amendment to the United States Constitution and in Article 1, Section 7 of the Louisiana Constitution.

DUTY

In the petition and supplemental and amending petitions, Byers alleges that the Warner defendants are liable to Byers under Louisiana tort law in that they were negligent and committed an intentional tort. However, before we can find that a cause of action has been set forth based on a negligence or intentional tort theory of recovery under the facts of this case, we must first determine whether a duty was owed by the Warner defendants to Byers. A duty represents a legally enforceable obligation to conform to a particular standard of conduct. *Penton v. Clarkson*, 93-0657, p. 6 (La.App. 1st Cir. 3/11/94), 633 So.2d 918, 922. Louisiana courts have traditionally applied a duty- risk analysis to determine whether a plaintiff has stated a cause of action in tort against a particular defendant. *See Meany v. Meany*, 94-0251, p. 6 (La.7/5/94), 639 So.2d 229, 233. This approach is most helpful in cases where the only issue is whether the defendant stands in any relationship to the plaintiff as to create any legally recognized obligation of conduct for the plaintiff's benefit. *Pitre v. Opelousas General Hospital*, 530 So.2d 1151, 1155 (La.1988). The existence of duty is a question of law for the court to decide from the facts surrounding the occurrence in question. *Harris v. Pizza Hut of Louisiana, Inc.*, 455 So.2d 1364, 1371 (La.1984). When no duty exists, a court will dismiss

a petition as a matter of law for failure to state a cause of action. *See Pitre v. Opelousas General Hospital*, 530 So.2d at 1158.

The factual allegations which must be accepted as true are that Edmondson and Darrus viewed "Natural Born Killers" and began a crime spree shortly thereafter; Byers was shot while Edmondson and Darrus were on this crime spree; the Warner defendants produced, directed and marketed "Natural Born Killers" for the movie theatres and for video; the Warner defendants did not warn viewers of the film or video of the potential deleterious effects that repeated viewing of the film could have on teenage viewers; the Warner defendants were negligent through the production of a film which they knew, should have known or intended would incite people such as Edmondson and Darrus to commit violent acts such as the one committed against Byers; the film glorified the type of violence committed by Edmondson and Darrus against Byers through its treatment of individuals in the film who committed such acts as celebrities and heroes; and the Warner defendants failed to take steps to minimize the violent content of the film or the glorification of senselessly violent acts in the film. Thus, Byers essentially contends that the Warner defendants owed her a duty to not produce this film in the form in which it was released and/or to protect her from viewers who would imitate the violent acts or crimes committed by the film's two main characters and cause her harm.

We recognize that in Louisiana, a defendant does not owe a duty to protect a person from the criminal acts of third parties absent a special relationship which obligates the defendant to protect the plaintiff from such harm. *Lambert v. Word of Faith Ministries*, 95-1436, p. 2 (La.App. 3rd Cir. 4/17/96), 673 So.2d 1150, 1151, writ denied, 96-1001 (La.5/31/96), 673 So.2d 1037. We further note that in the present case, Byers has not, nor can she allege the existence of such a special relationship.

However, we agree with Byers that based on the allegations of the petition which we must accept as true for purposes of a peremptory exception raising the objection of no

cause of action, the Warner defendants are liable as a result of their misfeasance in that they produced and released a film containing violent imagery which was intended to cause its viewers to imitate the violent imagery. If the intentional action allegations contained in the petition can be proven at trial, the imposition of a duty would be warranted based on the same rationale used by the California court in *Weirum v. RKO General, Inc.*, 15 Cal.3d 40, 123 Cal.Rptr. 468, 539 P.2d 36 (1975) to impose a similar duty.

In *Weirum*, a radio station was liable for injuries caused by the negligent acts of its listeners responding to a broadcast by one of the radio's disc jockeys. The specific broadcast was made in conjunction with a contest sponsored by the station wherein listeners were encouraged and directed to be the first to locate a traveling disc jockey. The station would periodically announce the most recent location of the traveling disc jockey. The reward was money and prizes. While two listeners were rushing to find the traveling disc jockey, in response to the most recent broadcast by the station regarding the traveling disc jockey's whereabouts, they forced a third vehicle off the road. The driver of this third vehicle died as a result of the accident. The deceased driver's family filed a civil suit against the radio station. The California court, in imposing liability upon the radio station, found that a duty was owed to prevent the type of harm befallen by the deceased because the risk of harm to the deceased was imminently foreseeable. The court focused on the fact that the radio station directly urged motorist/listeners to immediately speed to a destination if they wanted to receive a prize. *Weirum v. RKO General, Inc.*, 123 Cal.Rptr. 468, 539 P.2d at 40.

If in fact, plaintiffs can prove their allegation that the Warner defendants, through the creation and release of "Natural Born Killers," intended to urge viewers to imitate the criminal conduct of "Mickey and Mallory," the main characters in the film, then the risk of harm to a person such as Byers would be imminently foreseeable, justifying the imposition of a duty upon the Warner defendants to re-

frain from creating such a film. The breach of this duty would render the Warner defendants liable for the damages inflicted on innocent third parties such as Patsy Byers by viewers of the film imitating the violent imagery depicted in the film.

While we note that courts across the nation have generally refused to hold filmmakers, producers, directors and/or promoters liable for injuries allegedly sustained from others imitating actions or scenes depicted in a film, television broadcast or magazine, or described in a song, many of these dismissals came after the filing of a motion for summary judgment, or even after a trial on the merits and thus, after the parties had the opportunity to conduct discovery pertinent to the alleged facts. *See Way v. Boy Scouts of America*, 856 S.W.2d 230 (Tex.App. 5th Dist.1993) (motion for summary judgment granted dismissing plaintiff's claims against the publisher of a firearm advertisement in a magazine which advertisement allegedly caused a fatal firearm injury to plaintiff's son); *Yakubowicz v. Paramount Pictures Corporation*, 404 Mass. 624, 536 N.E.2d 1067 (1989) (motion for summary judgment granted dismissing plaintiff's claim that the producer of a gang violence film was liable for the murder of plaintiff's son who had viewed the film); *Bill v. Superior Court of the City and County of San Francisco*, 137 Cal.App.3d 1002, 187 Cal.Rptr. 625 (1st Dist.1982) (motion for summary judgment granted dismissing plaintiff's claim that the producer of a gang violence film was liable for the shooting of plaintiff's daughter by a third party shortly after both saw the film); *DeFilippo v. National Broadcasting Co., Inc.*, 446 A.2d 1036 (R.I.1982) (motion for summary judgment granted dismissing plaintiff's claim that the broadcast of a hanging stunt on a television program caused the death of plaintiff's son who tried to imitate the stunt); *Walt Disney Productions, Inc. v. Shannon*, 247 Ga. 402, 276 S.E.2d 580 (1981) (motion for summary judgment granted dismissing plaintiff's claim that the broadcast of a television program caused plaintiff's son to be injured when the son imitated an experiment performed on the television program); and *Olivia N.*

v. National Broadcasting Co., Inc., 126 Cal.App.3d 488, 178 Cal.Rptr. 888 (1st Dist.1981) (judgment of non-suit granted at trial when plaintiff admitted that the film at issue in the suit did not incite the unlawful behavior which injured the plaintiff). It was a rare situation where the dismissal was granted based solely on the allegations contained in the petition.[10] *See Zamora v. Columbia Broadcasting System*, 480 F.Supp. 199 (S.D.Fla.1979); see also *McCollum v. CBS, Inc.*, 202 Cal.App.3d 989, 249 Cal.Rptr. 187 (2nd Dist.1988). We do not find these two latter cases to be persuasive to our decision in the present case.

In *Zamora v. Columbia Broadcasting System*, 480 F.Supp. 199, the pleadings did not contain any allegations of intentional conduct by the film producers. In this case, the petition contains allegations that the Warner defendants intended to cause the viewers of "Natural Born Killers" to imitate the conduct of "Mickey and Mallory" and go on crime sprees involving the type of crime committed upon Patsy Byers. In *McCollum v. CBS, Inc.*, 202 Cal.App.3d 989, 249 Cal.Rptr. 187, the lyrics of a song were at issue and the court had the opportunity to examine all of the lyrics before deciding to dismiss the suit. Presently, the entire film is not before the court for examination as it was not introduced as evidence at the hearing on the peremptory exception raising the objection of no cause of action. Accordingly, based on the allegations contained in Byers' petition, we find that Byers has stated a cause of action for an intentional tort against the Warner defendants under Louisiana tort law.

Because we find that under the allegations of the petition, accepted as true, the Warner defendants may owe a duty to Byers and thus, the petition states a cause of action

---

10 In their memoranda to the trial court, both Byers and the Warner defendants acknowledge that decisions of other courts relating to questions of duty are persuasive to Louisiana courts faced with similar questions, relying on *Barrie v. V.P. Exterminators, Inc.*, 625 So.2d 1007 (La.1993).

under Louisiana law, we must address the Warner defendants' claim that the imposition of a duty would be in contravention of the guarantee of free speech contained in the First Amendment to the United States Constitution and Article 1, Section 7 of the Louisiana Constitution. Byers contends that the conduct of the Warner defendants in creating "Natural Born Killers" is not protected speech because it falls into two of the exceptions to the First Amendment guarantee of free speech: the obscenity exception and the incitement to imminent lawless activity exception.

First Amendment rights are accorded a preferred place in our democratic society. First Amendment protection extends to a communication, to its source and to its recipients. Above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. *See McCollum v. CBS, Inc.*, 249 Cal.Rptr. at 192. The fact a case does not involve government restriction of speech does not prevent the barring of an action by the first amendment. The chilling effect of permitting the imposition of civil liability based on negligence is obvious--the fear of damage awards may be markedly more inhibiting than the fear of prosecution under a criminal statute. *See Bill v. Superior Court of the City and County of San Francisco*, 187 Cal.Rptr. at 627. Motion pictures are a significant medium for the communication of ideas and are protected by the first amendment just like other forms of expression. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501-02, 72 S.Ct. 777, 780, 96 L.Ed. 1098 (1952).

However, the freedom of speech guaranteed by the First Amendment is not absolute. There are certain limited classes of speech which may be prevented or punished by the state consistent with the principles of the First Amendment: (1) obscene speech; (2) libel, slander, misrepresentation, obscenity, perjury, false advertising, solicitation of crime, complicity by encouragement, conspiracy, and the like; (3) speech or writing used as an integral part of conduct in violation of a valid criminal statute; and (4) speech which is directed to inciting or producing imminent

lawless action, and which is likely to incite or produce such action. *McCollum v. CBS, Inc.*, 249 Cal.Rptr. at 192-93.

Byers argues that "Natural Born Killers" falls within the incitement to imminent lawless activity exception to the First Amendment. The constitutional guarantee of free speech does not permit a state to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action. *Brandenburg v. Ohio*, 395 U.S. 444, 447, 89 S.Ct. 1827, 1829, 23 L.Ed.2d 430 (1969). Thus, to justify a claim that speech should be restrained or punished because it is (or was) an incitement to lawless action, the court must be satisfied that the speech (1) was directed or intended toward the goal of producing imminent lawless conduct and (2) was likely to produce such imminent conduct. Speech directed to action at some indefinite time in the future will not satisfy this test. Moreover, speech does not lose its First Amendment protection merely because it has "a tendency to lead to violence." *See Hess v. Indiana*, 414 U.S. 105, 108-09, 94 S.Ct. 326, 328-29, 38 L.Ed.2d 303 (1973).

In Byers' third supplemental and amending petition, it is alleged that the Warner defendants intended to incite viewers of the film to begin, shortly after viewing the film, crime sprees such as the one that led to the shooting of Patsy Byers. We must accept this allegation as true for purposes of the peremptory exception raising the objection of no cause of action. Once accepted as true, the film "Natural Born Killers," would fall into the unprotected category of speech directed to inciting or producing imminent lawless action and which is likely to incite or produce such action.

We note that in *Rice v. Paladin Enterprises, Incorporated*, 128 F.3d 233 (4th Cir.1997), the United States Fourth Circuit Court of Appeal held that the publisher of a book which contained step-by-step instructions on how to be a hit man could be civilly liable for the deaths of vic-

tims killed by a third person who followed the instructions in the book to murder the victims. The issue before the court was whether the book was protected under the First Amendment. The court found that the particular book was not protected speech. The United States Supreme Court denied writs. *Paladin Enterprises Incorporated v. Rice*, 118 S.Ct. 1515, 140 L.Ed.2d 668 (1998).

In *Rice*, it was stipulated by Paladin that it not only knew that the book's instructions might be used by murderers, but, it actually intended to provide assistance to murderers and would be murderers.

The U.S. Fourth Circuit further stated:

> In other words, the First Amendment might well circumscribe the power of the state to create and enforce a cause of action that would permit the imposition of civil liability, such as aiding and abetting civil liability, for speech that would constitute pure abstract advocacy, at least if that speech were not "directed to inciting or producing imminent lawless action, and ... likely to incite or produce such action." *Brandenburg*, 395 U.S. at 447, 89 S.Ct. at 1829. The instances in which such advocacy might give rise to civil liability under state statute would seem rare, but they are not inconceivable. Cf. *Schenck v. United States*, 249 U.S. 47, 39 S.Ct. 247, 63 L.Ed. 470 (1919) (criminal conspiracy prosecution predicated upon subversive advocacy)....
>
> * * * * * *
>
> After carefully and repeatedly reading Hit Man in its entirety, we are of the view that the book so overtly promotes murder in concrete, nonabstract terms that we regard as disturbingly disingenuous both Paladin's cavalier suggestion that the book is essentially a comic book whose "fantastical" promotion of murder no one could take seriously, and amici's reckless characterization of the book as "almost avuncular," see Br. of Amici at 8-9. The

unique text of Hit Man alone, boldly proselytizing and glamorizing the crime of murder and the "profession" of murder as it dispassionately instructs on its commission, is more than sufficient to create a triable issue of fact as to Paladin's intent in publishing and selling the manual.

* * * * * *

Paladin, joined by a spate of media amici, including many of the major networks, newspapers, and publishers, contends that any decision recognizing even a potential cause of action against Paladin will have far-reaching chilling effects on the rights of free speech and press. See Br. of Amici at 3, 22 ("Allowing this lawsuit to survive will disturb decades of First Amendment jurisprudence and jeopardize free speech from the periphery to the core.... No expression--music, video, books, even newspaper articles-- would be safe from civil liability."). That the national media organizations would feel obliged to vigorously defend Paladin's assertion of a constitutional right to intentionally and knowingly assist murderers with technical information which Paladin admits it intended and knew would be used immediately in the commission of murder and other crimes against society is, to say the least, breathtaking. But be that as it may, it should be apparent from the foregoing that the indisputably important First Amendment values that Paladin and amici argue would be imperiled by a decision recognizing potential liability under the peculiar facts of this case will not even arguably be adversely affected by allowing plaintiffs' action against Paladin to proceed. In fact, neither the extensive briefing by the parties and the numerous amici in this case, nor the exhaustive research which the court itself has undertaken, has revealed even a single case that we regard as factually analogous to this case. Paladin and amici insist that recognizing the existence of a cause of action against Paladin predicated on aid-

ing and abetting will subject broadcasters and publishers to liability whenever someone imitates or "copies" conduct that is either described or depicted in their broadcasts, publications, or movies. This is simply not true. In the "copycat" context, it will presumably never be the case that the broadcaster or publisher actually intends, through its description or depiction, to assist another or others in the commission of violent crime; rather, the information for the dissemination of which liability is sought to be imposed will actually have been misused vis-a-vis the use intended, not, as here, used precisely as intended. It would be difficult to overstate the significance of this difference insofar as the potential liability to which the media might be exposed by our decision herein is concerned.

And, perhaps most importantly, there will almost never be evidence proffered from which a jury even could reasonably conclude that the producer or publisher possessed the actual intent to assist criminal activity. In only the rarest case, as here where the publisher has stipulated in almost taunting defiance that it intended to assist murderers and other criminals, will there be evidence extraneous to the speech itself which would support a finding of the requisite intent; surely few will, as Paladin has, "stand up and proclaim to the world that because they are publishers they have a unique constitutional right to aid and abet murder." Appellant's Reply Br. at 20. Moreover, in contrast to the case before us, in virtually every "copycat" case, there will be lacking in the speech itself any basis for a permissible inference that the "speaker" intended to assist and facilitate the criminal conduct described or depicted. Of course, with few, if any, exceptions, the speech which gives rise to the copycat crime will not directly and affirmatively promote the criminal conduct, even if, in some circumstances, it inciden-

> tally glamorizes and thereby indirectly promotes such conduct. 128 F.3d at 249, 254, 265.

As previously indicated, plaintiffs have alleged the very intent on the part of the Warner defendants referred to by the *Rice* court. Because this case is before us on a peremptory exception pleading the objection of no cause of action, we must accept this allegation as true. However, in holding that plaintiffs' allegations of intent state a cause of action, we do not address the issue of whether the Warner defendants may later invoke the protection of the First Amendment guarantee of free speech to bar Byers' claim after discovery has taken place. It is only by accepting the allegations in Byers' petition as true that we conclude that the film falls into the incitement to imminent lawless activity exception to the First Amendment. We agree with *Rice v. Paladin Enterprises, Incorporated*, 128 F.3d 233, that the mere foreseeability or knowledge that the publication might be misused for a criminal purpose is not sufficient for liability. Proof of intent necessary for liability in cases such as the instant one will be remote and even rare, but at this stage of the proceeding we find that Byers' cause of action is not barred by the First Amendment. Since we have determined that the allegations of plaintiffs' petition bring the case at this stage into the incitement to imminent lawless activity exception, we need not address Byers' claim that the film constitutes obscene speech.

CONCLUSION

For these reasons, the judgment of the trial court is reversed and the matter is remanded to the trial court for further proceedings consistent with the views expressed herein. Costs of this appeal are assessed to the Warner defendants.

REVERSED AND REMANDED.

FITZSIMMONS, J., assigns additional reasons.

FITZSIMMONS, Judge, assigning additional reasons.

I write specifically to assign additional reasons.

I note that the issue of the protection that has afforded so many so much under the First Amendment has been considered sparingly by the United States Supreme Court. Rightfully so. Yet the issue of violence is one that has not been squarely submitted to the present Supreme Court for review in this format and intensity.

Where the intentional, deliberative infliction of suffering and agony has the goal of emulation, such a product does not free from the specter of "liability those who would, for profit or other motive, intentionally assist and encourage crime and then shamelessly seek refuge in the sanctuary of the First Amendment." *Rice v. Paladin Enterprises, Incorporated*, 128 F.3d 233, 248 (4th Cir.1997), cert. denied, 118 S.Ct. 1515, 140 L.Ed.2d 668 (1998).

APPENDIX B

PATSY ANN BYERS, ET AL	:	NUMBER 95-02213, DIVISION "C"
	:	21ST JUDICIAL DISTRICT COURT
VERSUS	:	
	:	PARISH OF TANGIPAHOA
SARAH EDMONDSON, ET AL.	:	
	:	STATE OF LOUISIANA
FILED: _____	:	DY. CLERK: _____

REASONS FOR JUDGMENT

This matter is presently before the Court on exceptions of no cause of action. Other pending exceptions were deferred until the ruling on the present issues. The tragic events leading up to this litigation have resulted in legal issues which, to say the least, are not those faced on an everyday basis in this Court. The Court has considered the well-reasoned and sometimes passionate arguments and memoranda of the respective parties, and has given considerable thought to the matter prior to making this ruling.

The pertinent allegations giving rise to the present exceptions are contained in the second supplemental and amended petition filed by Plaintiffs. This amended petition brought in as defendants the present exceptors, who are alleged to be creators, producers and distributors of a motion picture called "Natural Born Killers". The allegations of this petition, as against these defendants, include the following:

IIC.

> Upon information and belief, defendants, Benjamin Darrus and Sarah Edmondson, went upon a crime spree culminating in the shooting and permanent injury to Patsy Ann Byers as a result of seeing and becoming inspired by the movie "Natural Born Killers" produced, directed and distributed by the Hollywood defendants.

V(E)

> All of the Hollywood defendants are liable, more particularly, but not exclusively for, distributing a film which they knew or should have known would cause and inspire people such as defendants, Sarah Edmondson and Benjamin Darrus, to commit crimes such as the shooting of Patsy Ann Byers, and for producing and distributing a film which glorified the type of violence defendants committed against Patsy Ann Byers by treating individuals who commit such violence as celebrities and heroes, as well as for such other negligence as will be learned during discovery and shown at trial of this matter.

As is pointed out in the memoranda of Exceptors, similar contentions have been almost universally rejected as stating causes of action in the courts of this country. The basis for this position is surely in part the almost impossible task of where a line is drawn, and what standards would be applied. Further, such analyses are juxtaposed with constitutional free speech provisions protected under the United States and Louisiana Constitutions.

While this Court is mindful of the personal tragedy suffered by Plaintiffs, and cannot personally condone much of what is depicted in motion pictures, television and the like, the Court must apply the law, and, in this case, the law simply does not recognize a cause of action such as that presented in Plaintiffs' petition.

There has been no contention by counsel that Plaintiff could otherwise amend her petition so as to attempt to state any other cause of action as against exceptors. Accordingly, the exceptions will be sustained, and this suit dismissed as against these exceptors.

Amite, Louisiana, this 23rd day of January, 1997.

Robert H. Morrison, III
Judge, Division "C"

PATSY ANN BYERS, ET AL	:	NUMBER 95-02213, DIVISION "C"
	:	21ST JUDICIAL DISTRICT COURT
VERSUS	:	
	:	PARISH OF TANGIPAHOA
SARAH EDMONDSON, ET AL.	:	
		STATE OF LOUISIANA
FILED: _____		DY. CLERK: _____

JUDGMENT

This matter came on for trial before the Court on exceptions of no cause of action filed by Defendants, Time Warner Entertainment Company, L.P., Alcor Film & TV GMBH & Co. Produktions KG, Jane and Don Productions, Inc., and Oliver Stone, and Time Warner, Inc. At the hearing, the parties adduced their argument, and at the conclusion of the hearing, the Court took the matter under advisement.

Considering the pleadings filed in these proceedings, the arguments and memoranda of counsel, and for written reasons this day assigned:

IT IS ORDERED, ADJUDGED AND DECREED, that the exceptions of no cause of action be sustained, and, accordingly, that this suit be dismissed as to those claims of Plaintiffs as against Defendants, Time Warner Entertainment Company, L.P., Alcor Film and TV GMBH & Co. Productions KG, Jane and Don Productions, Inc., and Oliver Stone and Time Warner, Inc.

JUDGMENT READ, RENDERED AND SIGNED, at Amite, Louisiana, this 23rd day of January, 1997.

Robert H. Morrison, III
Judge, Division "C"

Please send copies and notice to:

All counsel of record

APPENDIX C

The Supreme Court of the State of Louisiana

PATSY ANN BYERS, ET AL

vs.

SARAH EDMONSON, ET AL.

NO. 98-C - 1596

– – – – –

IN RE: Time Warner Entertainment Co.; L.P. Alcor Film; TV GMBH & Co. Production KG; Jan & Don Productions Inc.; Stone, Oliver; –Defendants(s); Applying for Writ of Certiorari and/or Review; Parish of Tangipahoa 21st Judicial District Court Div. "C" Number 95-02213; to the Court of Appeal, First Circuit, Number CA97 0831

– – – – –

October 9, 1998

Denied.

BJB
WFM
HTL
CDK
JPV
CDT
JTK

CALOGERO, C.J. not on panel.

Supreme Court of Louisiana
October 9, 1998

Clerk of Court
For the Court

APPENDIX D

TWENTY-FIRST JUDICIAL DISTRICT COURT

PARISH OF TANGIPAHOA

STATE OF LOUISIANA

NUMBER: 9502213 Division C

PATSY ANN BYERS, ET AL.

VERSUS

SARA EDMONDSON, ET AL.

* * * * *

MEMORANDUM IN SUPPORT OF PEREMPTORY EXCEPTION OF NO CAUSE OF ACTION

Defendants Time Warner Entertainment Company, L.P., Alcor Film & TV GMBH & Co. Produktions KG, Jane and Don Productions Inc., and Oliver Stone (collectively "Warner Defendants")[1] respectfully submit this memorandum in support of their Peremptory Exception of No Cause of Action.

---

1 Jane and Don Productions Inc. is incorrectly named Plaintiff's Petition as "J.D. Productions," Alcor Film & TV GMBH & Co Produktions KG is incorrectly named in the Plaintiff's Petition as Alcor Films. Further, the Plaintiff's Petition names two purported defendants (Warner Home Video and Warner Brothers) that are merely operating divisions of Time Warner Entertainment Company, L.P. A motion to strike the allegations against Warner Home Video and Warner Brothers is being separately filed.

Plaintiff alleges that two disturbed young people watched a movie, then imitated events in that movie by shooting Plaintiff and causing her grievous injuries. Ms. Byers is the victim of a senseless act that has become the subject of a criminal prosecution. However, the Warner Defendants, as the creators and distributors of a movie, cannot be responsible for the intentional misconduct of others, and had no duty to ensure that audience members would not imitate events in a work of fiction. To impose such a duty would contravene Louisiana negligence law, the First Amendment to the United States Constitution, and Article I, Section 7 of the Louisiana Constitution.

* * * * *

A. Recognition of duty to guard against imitation would violate the United States and Louisiana constitutions.

As shown above, Louisiana tort law does not impose upon the Warner Defendants the novel duty to protect against imitation of a fictional motion picture. Even if Louisiana tort law did somehow impose such a duty, the First Amendment and the Louisiana Constitution would bar the imposition of that duty because it would drastically curtail artistic expression of all kinds. Faced with such boundless liability, those who create movies, books, records, paintings, and other works would surely shy away from a wide variety of controversial and provocative work. A duty to protect against imitation would cast a "pall of fear and timidity" over creative expression and "dampen the vigor and limit . . . the variety" of such expression, in clear violation of the First Amendment. *New York Times Co. v. Sullivan*, 376 U.S. 254, 278-79, 84 S. Ct. 710, 725 (1964).

This constitutional analysis finds direct support in the decisions of both the Fifth Circuit and the Louisiana Supreme Court. In *Herceg v. Hustler Magazine, supra,* the plaintiffs sought to impose a duty on publishers to ensure that readers would not emulate conduct described by the publisher in a manner that would cause injury to the reader or others. Judge Rubin rightly recognized that such a duty

would place an unprecedented chill on ideas — speech — that would violate core constitutional principles:

> [F]irst amendment protection is not eliminated simply because publication of an idea creates a potential hazard . . . . [U]nclear or diminished standards of first amendment protection may both inhibit the expression of protected ideas by other speakers and constrict the right of the public to receive those ideas.

Herceg, 814 F.2d at 1020. The First Amendment and the Louisiana Constitution do not allow the creation of "liability in an indeterminate amount for an indeterminate time to an indeterminate class." *Pittman v. Dow Jones & Co., Inc.* 662 F. Supp. 921, 922 (E.D. La.), *aff'd*, 834 F.2d 1171 (5th Cir. 1987).

The Louisiana Supreme Court, like the Fifth Circuit in *Herceg*, also has refused an invitation to sustain a novel cause of action with First Amendment implications. In *Gugliuzza v. K.C.M.C., Inc.* 606 So. 2d 790 (La. 1992), the Court held that allowing a cause of action for defamation of the dead would not only be contrary to every jurisdiction that had considered the question, but also would unduly impinge the freedoms guaranteed by the First Amendment and Article 1, Section 7 of the Louisiana Constitution. *Gugliuzzia* explicitly recognizes that the state and federal constitutions both directly bar expansive theories of tort liability that inevitably would chill the exercise of protected expression.

In this case, Plaintiff seeks to do precisely what the Supreme Court rejected in *Gugliuzza* and what Judge Rubin prohibited in *Herceg*. The petition alleges that the Warner Defendants should be held liable because they created and distributed a movie that "glorified the type of violence defendants committed against Patsy Ann Byers" and "treat[ed] individuals who commit such violence as celebrities and heroes." Petition ¶ V(E). Even accepting the Plaintiff's subjective characterizations as true for purposes

of this Peremptory Exception, the First Amendment precludes imposing liability on the Warner Defendants.

Others courts have reached the same conclusion as *Gugliuzza* and *Herceg*. *See, e.g., Winter v. G.P. Putnam's Sons*, 938 F.2d 1033, 1037 (9th Cir. 1991) (liability should not be extended to ideas contained in a book; "the gentle tug of the First Amendment and values embodied therein would remind us of the social costs"); *Zamora v. CBS*, 480 F. Supp. 199, 206 (S.D. Fla. 1979) (the imposition of a duty on broadcasters to be responsible for the actions of undefined audience members "would be an unconstitutional exercise by this Court"); *McCollum v. CBS, Inc.*, 249 Cal. Rptr. 187 (Cal. Ct. App. 1988) ("it is simply not acceptable to a free and democratic society to impose a duty upon performing artists to limit and restrict their creativity in order to avoid the dissemination of ideas in artistic speech which may adversely affect emotionally troubled individuals").

* * * * *

* * * * Plaintiff's theory of liability would abrogate the rights of free speech and expression at the core of the Louisiana and U.S. Constitutions.

APPENDIX E

PATSY ANN BYERS, ET AL	:	NUMBER 95-02213, DIVISION "C"
	:	21ST JUDICIAL DISTRICT COURT
VERSUS	:	
	:	PARISH OF TANGIPAHOA
SARAH EDMONDSON, ET AL.	:	STATE OF LOUISIANA

PLAINTIFFS' OPPOSITION TO DEFENDANT'S EXCEPTION OF NO CAUSE OF ACTION

MAY IT PLEASE THE COURT:

INTRODUCTION

On the night of March 8, 1995, Patsy Byers was working alone at a convenience store in Ponchatoula. Shortly before midnight, Sarah Edmondson entered the store; waiting outside was her boyfriend, Ben Darrus. After she engaged in a brief conversation with Mrs. Byers, Sarah pulled out a .38-caliber pistol and fired a bullet which shattered Patsy Byers' spine. Patsy Byers, wife and mother of three, was left for dead and her store was robbed. Patsy Byers is now unable to move or feel anything from the neck down.

After Darrus and Edmondson were apprehended, it came to light that the pair had repeatedly watched a videotape of Oliver Stone's "Natural Born Killers," a motion picture which followed the exploits of a young couple ("Mickey and Mallory"). This fictional couple tours the United States in a car, murdering and/or robbing numerous people and businesses in a graphic killing spree riddled with sexual overtones and subliminal messages advocating and glorifying violence. In the film, the two become the darlings of the media and the free world. At the end of the film, the two, in a veritable orgy of violence and destruction (complete with an attempted rape scene), escape retri-

bution for their crimes. In a twisted ending, the two ride off into the sunset towards a bright and happy future.

Sarah and Ben repeatedly viewed the movie on videotape, sometimes under the influence of mind-altering drugs. Desiring to emulate the protagonists of the video, Sarah and Ben got a .38 caliber revolver from Sarah's parents' cabin along with a box of ammunition, and began their own reenactment of the "Mickey and Mallory" story. They first murdered a Mississippi cotton gin owner, Bill Savage, and then, after travelling cross-country to Louisiana, attempted to brutally murder Patsy Byers.

* * * * *

APPENDIX F

COURT OF APPEAL FOR THE FIRST CIRCUIT

STATE OF LOUISIANA

NO. 97-CA-0831

PATSY BYERS, ET AL
Plaintiffs

VERSUS

SARAH EDMONDSON, ET AL.
Defendants

ON APPEAL FROM THE JUDGMENT OF THE TWENTY-FIRST JUDICIAL DISTRICT COURT FOR THE PARISH OF TANGIPAHOA, THE HONORABLE ROBERT MORRISON, III, J., PRESIDING
NO. 95-02213

ORIGINAL BRIEF ON BEHALF OF APPELLEES

* * * * *

C. The Film is Not an Incitement under *Brandenburg v. Ohio*.

In *Brandenburg v. Ohio*, 395 U.S. 444, 447, 23 L. Ed. 2d 430, 89 S. Ct. 1827 (1969), the Supreme Court enunciated an exception to First Amendment protection where speech "is directed to inciting or producing imminent

lawless action and is likely to incite or produce such action." Later, in *Hess v. Indiana,* the Supreme Court elaborated on the requirement of "imminent lawless action" and held that speech may not be proscribed merely because it advocates illegal action in the future; the speech must advocate immediate lawless action. 414 U.S. 105, 107, 38 L. Ed. 2d 303, 94 S. Ct. 326 (1973).

Accordingly, even if *Natural Born Killers* were to encourage unlawful behavior (which the Warner defendants deny), the film still could not be excluded from First Amendment protection on this basis unless the film encourages *instantaneous* lawless action. The Appellant disputes this black letter requirement, however, and cites only to legal encyclopedias (and, of course, the *Weirum* case) for the proposition that *Brandenburg* "has been expanded to allow liability for speech presenting an undue risk of harm." Appellant's Brief at 20. This bald assertion is completely devoid of any support in case law that is controlling or persuasive.

Numerous courts have addressed the applicability of the *Brandenburg's* exclusion to cases in which imitation of a media work caused injury, and these courts uniformly have held that the exclusion does not apply if the speech does not encourage immediate lawless action. *See, e.g., Herceg v. Hustler Magazine*, 814 F.2d 1017, 1022 (5th Cir. 1987), *cert. denied* 485 U.S. 959, 99 L. Ed. 2d 420, 108 S. Ct. 1219 (1988) ("the crucial element to lowering the First Amendment shield is the imminence of the threatened evil"); *DiFilippo v. NBC*, 446 A.2d 1036 (R.I. 1982); *Walt Disney Productions, Inc. v. Shannon*, 276 S.E.2d 580 (Ga. 1981), *Olivia N. v. NBC*, 126 Cal. App. 3d 488 (Ca. Ct. App. 1st Dist. 1981), *writ denied* 458 U.S. 1108, 73 L. Ed. 2d 1369, 102 S. Ct. 3487 (1982); *Zamora v. CBS,* 480 F. Supp. 199 (S.D. Fla. 1979).

Indeed, another lawsuit making identical allegations about the film *Natural Born Killers* was dismissed in Georgia, recognizing that a film cannot meet the immediacy requirement of *Brandenburg. Miller v. Warner Brothers, Inc.*, Civ. Action No. 96vs117599-F (Fulton Cty. Ga.

Dec. 3, 1996) (Exhibit "C"). In *Miller*, a woman claimed that her husband had been murdered by two young people who had repeatedly watched *Natural Born Killers*. In a petition using language identical to Appellant's lawsuit (even using the same mildly derisive "Hollywood defendants" label), the plaintiff claimed that the move proximately caused the murder. Judge Westmoreland granted the defendants' motion to dismiss, holding that

> . . . the lawsuit, as a matter of law, cannot meet the requirements found in *Brandenburg v. Ohio*, 395 U.S. 444 (1969), which protects statements except direct incitement to imminent unlawful action. See *Walt Disney Productions, Inc. v. Shannon*, 247 Ga. 402 (La. 1981).

See Exhibit "C" at [276 S.E.2d 580]"[10]

---

10 As here, the plaintiff in *Miller* tried to avoid dismissal by making vague allegations that *Natural Born Killers* contains some unidentified "subliminal messages." Judge Westmoreland correctly held that these allegations, even if proven at a trial, were not actionable. *See Miller*, Exhibit "C" at 2.

In this case, Appellant raised the "subliminal message" red herring for the first time in her Third Supplemental and Amending Petition, filed just seven days before the Warner defendants' peremptory exception hearing. Third Supp. & Amending Petition at ¶ V(E) (Record 155). The alleged messages were never identified in any way, and the District Court dismissed the complaint noting that "[t]here has been no contention by counsel that Plaintiff could otherwise amend her petition so as to attempt to state any other cause of action." Reasons for Judgment (Record 325-326)

Neither Judge Westmoreland in Georgia nor Judge Morrison here in Louisiana were distracted by the subliminal message argument, and neither should be this Court. First, Appellant has abandoned this theory on appeal by not specifically raising it as a ground of error or basis for reversal. *State v. Nuccio*, 454 So. 2d 93, 98 (La. 1984). Moreover, a naked al-

In another recent case, *Davidson v. Time Warner, supra,* a federal court in Texas similarly refused to impose liability for the inflammatory lyrics of Tupac Shakur's rap album *2Pacalypse Now.*. The court explained:

Finally, the Davidsons' own evidence undermines their claim that Officer Davidson was murdered as a result of some call to imminent, violent action by Shakur. Howard had been listening to *2Pacalypse Now* repeatedly, rewinding and playing various songs, for some 45 minutes before killing Office Davidson. . . . [T]he Court cannot conclude that *2Pacalypse Now* was likely to cause *imminent* lawless conduct. At best the recording reveals that weak-willed individuals may be influenced by Shakur's work. As the Supreme Court explained, swaying the weak-willed does not remove constitutional protection from speech:

> We have been show no evidence that substantial numbers of citizens are standing ready to strike out physically at whoever may assault their sensibilities with execrations like that uttered by Cohen. There may be some persons about with such lawless and violent proclivities, but that is an insufficient base upon which to erect, consistently with constitutional values, a governmental power to force persons who wish to ventilate their dissident views into avoiding particular forms of expression

[*Cohen v. California*, 403 U.S. 15, 22, 29 L. Ed. 2d 284, 91 S. Ct. 1780, 1787 (1971).]

---

legation of unnamed and unidentified "subliminal messages" does not make otherwise constitutionally-protected speech the subject of extensive discovery and civil liability. Even in cases where a plaintiff has specifically plead and identified alleged "subliminal messages" that were direct commands to the audience to commit violence, no liability has been found. *See Waller v. Osbourne*, 763 F. Supp. 1144 (M.D. Ga. 1991), *aff'd*, 958 F.2d 1084 (11th Cir.) (table), *cert denied*, 506 U.S. 916, 121 L. Ed. 2d 245, 113 S. Ct. 325 (1992); *Vance v. Judas Priest*, 1990 WL 130920 (Nev. Dist. Ct. Aug. 24, 1990).

> The Defendants cannot be responsible for determining the mental condition of each and every potential listener.

Exhibit "B" at 39-40. In the present case, the Appellant admits that Edmondson and Darrus viewed *Natural Born Killers* "repeatedly" before beginning their criminal activities, and that the couple traveled over at least two states to commit these acts, a journey that took hours, if not days. Appellant's Brief at 2. Thus, it is clear that the film did not inspire *immediate* lawless activity, and at most the lawsuit alleges that the film influenced two weak-willed individuals eventually to commit violence. Such alleged influence simply is insufficient to overcome First Amendment protection.

Indeed, the immediacy requirement of *Brandenburg* applies even when a defendant *knows* that illegal activity will result from publication. A federal court in Maryland recently ruled that the Constitution prohibited the imposition of liability on the publisher of instruction manuals for hired killers, when the publisher stipulated that the manilas were followed in three brutal murders, and that the publisher knew some of the manuals' readers would use the manuals in carrying out contract killings. *Rice v. Paladin Enterprises*, 940 F. Supp. (D. Md. 1996). The *Rice* court noted the similarity between the facts of that case and "cases involving violent movies and television programs that were alleged to have caused physical injury or death. . . . [Those movies and television shows] were considered depictions of violence alleged to have been imitated. *Id.* at 846. The court found that just as the earlier cases did not meet the constitutionally mandated standard of "incitement to imminent lawless activity," neither did the case before it, *id.* at 844-48, especially in light of the cast that "[t]he book does not purport to order or command anyone to any concrete action at any specific time, much less immediately." *Id.* at 847.

If the First Amendment protects a "how-to-kill" manual for hired killers -- which it clearly does — there can be no question that a fictional movie is similarly entitled to

constitutional protection. There is no meaningful way for the Appellant to distinguish *Rice, Davidson, Miller*, and the numerous other cited cases. This Court should follow these numerous decisions and dismiss this lawsuit for failing to meet the mandate of *Brandenburg*.

In sum, the Appellant has failed to offer a single case that has denied constitutional protection of speech in a case with facts even remotely similar to those at hand. *Natural Born Killers* is speech that is protected by the First Amendment and the Louisiana Constitution. Accordingly, the Warner defendants cannot be held liable for producing and distributing the film. The judgment of the District Court must be affirmed.

* * * * *

APPENDIX G

SUPREME COURT

STATE OF LOUISIANA

NO. 98 C-1596

PATSY ANN BYERS, ET AL.

VERSUS

SARAH EDMONDSON, ET AL.

APPLICATION ON BEHALF OF
TIME WARNER ENTERTAINMENT COMPANY, L.P.,
ALCOR FILM & TV GMBH & CO. PRODUKTIONS KG,
JANE & DON PRODUCTIONS, INC., OLIVER STONE
AND TIME WARNER, INC. FOR WRITS FROM THE
FIRST CIRCUIT COURT OF APPEAL

* * * * *

ORIGINAL WRIT APPLICATION ON BEHALF OF TIME WARNER ENTERTAINMENT COMPANY, L.P., ALCOR FILM & TV GMBH & CO. PRODUKTIONS KG, JANE & DON PRODUCTIONS, INC., OLIVER STONE AND TIME WARNER, INC.

* * * * *

III. THE COURT OF APPEAL ERRED IN IMPOSING A DUTY ON FILMMAKERS TO PREVENT AUDIENCE MEMBERS FROM IMITATING FICTIONAL MOVIE VIOLENCE, BECAUSE SUCH A DUTY VIOLATES THE FREE SPEECH PROVISIONS OF THE UNITED STATES AND LOUISIANA CONSTITUTIONS

As shown above, Louisiana law does not impose a legal duty on movie producers and distributors to prevent audience members from imitating on on-screen depictions of fictional violence. But even if state law did impose such a duty, the First Amendment and the Louisiana Constitution[14] would bar imposing liability for an alleged breach of that duty. The specter of such boundless liability would cause those who create movies, music, books, and other creative works to avoid controversial or provocative subjects. Imposing a duty to prevent imitation of fictional scenes casts a "pall of fear and timidity" over creative expression and "dampens the vigor and limits the variety" of expression in a way that is incompatible with he First Amendment. *New York Times Co. v. Sullivan*, 376 U.S. 254, 278-79, 84 S.Ct. 710, 725 (1964).

A. The Depiction of Allegedly "Glorified" Fictional Violence in Movies Does Not Fall Within the Narrow Exception for Speech that Incited Imminent Lawless Conduct and is Likely to Produce Such A Result.

The production and distribution of films is "speech" subject to the protections of the constitution. *E.g., Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501, 72 S. Ct. 777, 780 (1952). All speech and expression is presumptively protected, regardless of subjective claims of its social

---

14 This Court has indicated that Article I, Section 7 of the Louisiana Constitution of 1974 may provide even greater protection for speech than does the First Amendment. *See, e.g., Ieyoub v. The Ben Bagert for Attorney General Committee, Inc.*, 590 So.2d 572 (La. 1991) (Dennis, J., concurring in denial of writ application).

"value," unless it comes within the scope of certain narrow, well-defined categories. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72, 62 S. Ct. 766 (1942) (only a select few "well-defined and narrowly limited classes of speech" may be regulated based on their content). Here, the only category of unprotected speech that the Court of Appeal suggested applies to the film *Natural Born Killers* is the "incitement" doctrine set forth in *Brandenburg v. Ohio*, 395 U.S. 444, 89 S. Ct. 1827 (1969), and *Hess v. Indiana*, 414 U.S. 105, 94 S. Ct. 326 (1973). As set forth below, however, the Court of Appeal gravely erred in finding this case falls within the incitement exception set forth in *Brandenburg* and *Hess*.

In *Brandenburg*, a leader of the Ku Klux Klan faced prosecution under the Ohio criminal syndicalism statute for telling a crowd of armed, hooded Klansman to "bury the niggers", and "[w]e're not a revengent organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengence taken." *Brandenburg*, 395 U.S. at 466, 89 S. Ct. at 1829. The Supreme Court reversed *Brandenburg*'s conviction, holding that the Ohio law violated the First Amendment because it permitted conviction for the "abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence," which is constitutionally protected. *Id.*, 395 U.S. at 448, 395 S. Ct. at 1830 (quoting *Noto v. United States*, 367 U.S. 290, 297-98, 81 S. Ct. 1517, 1520-21 (1961)). The court held that:

> [T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.

395 U.S. at 447, 395 S. Ct at 1829.

Later in *Hess v. Indiana*, the Supreme Court unanimously applied *Brandenburg* to reverse the conviction of a street demonstrator who had shouted to a crowd, "[w]e'll

take the f___ing street later (or again)." *Hess v. Indiana*, 414 U.S. 105, 94 S. Ct. 326 (1973). While the Indiana Supreme Court had determined that Hess' shouted statement "was intended to incite further lawless action on the part of the crowd in the vicinity of the appellant and was likely to produce such action, "the United States Supreme Court reversed, holding that, as a matter of law, Hess' comment "at worst . . . amounted to nothing more than advocacy to illegal action at some indefinite future time. *Hess*, 414 U.S. at 108, 94 S. Ct. at 328. Even though both *Brandenburg* and *Hess* involved persons directly telling a crowd assembled before them what action the crowd should take, in neither case did the Supreme Court find the requisite "advocacy . . . directed to inciting or producing *imminent* lawless action [that was] likely to incite or produce such action." *Hess*, 414 U.S. at 108, 94 S. Ct. at 328 (quoting *Brandenburg*, 395 U.S. at 447, 89 S. Ct., at 1829 (emphasis supplied by court in *Hess*)).

The "incitement" doctrine of *Brandenburg* and *Hess* — which developed in cases involving crowd control in volatile situations — never before had been applied in a case remotely similar to this one, where a film released on videotape that depicts fictional violence is alleged to have inspired two "wildly reckless" and drug-taking viewers to embark on a crime spree. Rather, until this case, it uniformly has been recognized that movies, television programs, record albums and the like do not remotely meet the requirements of the "incitement" doctrine.

Plaintiff's petitions do not allege that *Natural Born Killer* directly advocates lawless action as required by *Brandenburg*; rather, they claim only that the film "glorifies" violence, which is inadequate to satisfy *Brandenburg*. Moreover, Plaintiff's claim fails to allege the requisite "imminence," as the violence blamed on the film occurred at a time remote from viewing of the film, and the film was viewed by people unknown to the Warner Defendants, at a time remote from production of the film, and under circumstances completely out of the filmmakers' control. Finally, the petitions fail to meet the require-

ment of *Brandenburg* that the film be *likely* to result in imminent lawless activity.

1. Fictional Depictions of Allegedly "Glorified" Violence Do Not Meet the *Brandenburg* Requirement of *Direct Advocacy* of *Imminent* Lawless Activity

It is undisputed that *Natural Born Killers* is a general release fictional film that later was released on home video. Plaintiff does not, and cannot, allege that the film contains direct commands to the audience to commit violent acts, but rather that the film "glorifies" violence, and thus "would cause or incite persons such as [the 'wildly reckless' and drug-taking] Edmondson and Darrus," "shortly after viewing" the film, to begin "crime sprees." Third Pet., Exhibit "D", ¶ V(D)(A). Plaintiff claims that Edmondson and Darrus "emulate[d]" two characters in the film, and began a "reenactment" of the story in the film. Plaintiff's Opposition to Defendants' Exception of No Cause of Action, Exhibit "E", at 1.

Until this case, no court ever has held that the mere depiction or description of violence --even in a way that is characterized ad "glorification"-- is direct advocacy under *Brandenburg*. Abandoning this distinction, as the Court of Appeal had done, invites an impossible task of determining when violence is "glorified" and when it is not. It invites heavy-handed censorship by courts and by juries. Plaintiff's criticism of *Natural Born Killers* indicates just what the Court of Appeal's decision, if left standing, will bring; judges and juries will be asked to decide whether filmmakers took legally sufficient "steps to minimize violent content" in films, and whether films "glorif[y]" "senselessly violent acts." How will a filmmaker know what to leave in and what to cut out? Was *The Godfather* too violent? Did it "glorify" mafia families? Do horror movies such as *Halloween* or *Psycho* "glorif[y]" senselessly violent acts and those who perpetrate such conduct"? What about disturbing, but realistic war films such as *Platoon* or *Apocalypse Now*? Judge Morrison wisely recognized that "similar" contentions have been rejected because of the

"the almost impossible task of where a line is drawn, and what standards would be applied." D.C. Reasons, Exhibit "A", at 2.

Every similar lawsuit seeking to impose liability based on the "glorification" of fictional violence has been rejected, often citing constitutional grounds. For instance, the film *Boulevard Nights* was a violent movie that allegedly attracted violence-prone viewers; in rejecting a civil cause of action based on violence traced to the showing of the film, the court held that the First Amendment precluded imposing liability:

> It is an unfortunate fact that in our society there are people who will react violently to movies, or other forms of expression, which offend them, whether the subject matter be gangs, race relations, or the Vietnam war. It may, in fact, be difficult to predict what particular expression will cause such a reaction, and under what circumstances. To impose upon the producers of a motion picture the sort of liability for which plaintiffs contend in this case would, to a significant degree, permit such persons to dictate, in effect, what is shown in the theaters of our land.

Bill v. Superior Court, 187 Cal. Rptr. 625, 629 (Cal. App. 1982). Depictions of violence, even allegedly glorified violence, never have been held to constitute "direct advocacy;" each case considering the issue has come to the opposite conclusion. *See, e.g., Lewis v. Columbia Pictures Industries, Inc.*, 23 Med. L. Rptr. 1052 (Cal. App. 1994) (*Boyz 'N the Hood* protected by First Amendment against claims that the film's advertisements incited violent conduct); *Phillips v. Syufy Enterprises*, 20 Med. L. Rptr. 1199 (Cal. Sup. St. 1992) (*Boyz 'N the Hood* protected by First Amendment, regardless of "purpose" of speech; its protection does not turn on "speculative and essentially hopeless task[] [of] trying to define the *real* or *ultimate* objective of speech"); *Yakubowicz v. Paramount Pictures Corp.*, 536 N.E.2d 1067 (Mass. 1989) (film *The Warriors*, that alleg-

edly glorified gang violence in fictional depictions, was protected by the First Amendment). Even the *Rice* case, in the language quoted by the Court of Appeal itself, makes a clear distinction between direct advocacy of illegal conduct and expression that "incidentally glamorizes and thereby indirectly promotes" violence. *Rice*, 128 F.3d at 266.

Not only do the facts alleged by Plaintiff fail to satisfy *Brandenburg's* direct advocacy requirement, they also do not meet *Brandenburg's* limitation of actionable speech to that which is directed to inciting *imminent* lawless activity. Plaintiff does not allege that Edmondson and Darrus flew into a rage while watching *Natural Born Killers* and committed immediate mayhem; their crimes were committed "shortly after" viewing the film — after traveling from Oklahoma through Mississippi and into Louisiana. Moreover, it is doubtful whether any pre-recorded fictional work ever could meet this requirement, because the distributor of a movie cannot control who views it, cannot control the circumstances under which the movie is watched, and cannot prevent a movie from being watched "repeatedly" by "wildly reckless" persons whose perceptions are twisted by mind-altering drugs. *See, e.g., Davidson*, 25 Med. L. Rptr. at 1722-23 (rap music album); *McCollum v. CBS*, 15 Med. L. Rptr. 2001, 2006-07 (Cal. App. 1988) (heavy metal music album).[15]

---

15 The Court of Appeal opinion also failed to mention that its ruling was directly contrary to that of a Georgia court in a virtually identical lawsuit seeking to blame a real-life criminal assault on make-believe violence, in the movie *Natural Born Killers*. Judge Westmoreland in the State Court of Fulton County, Georgia, recognizing that films lack the direct advocacy and imminence required by *Brandenburg*, dismissed the plaintiffs' claims on the pleadings, holding that:

> [T]he lawsuit, as a matter of law, cannot meet the requirements found in *Brandenburg v. Ohio*, 395 U.S. 449 (1969), which protects statements except direct incite-

2. Fictional Depictions of Allegedly "Glorified" Violence Do Not Meet the *Brandenburg* Requirement of Speech that is *Likely* to Result in Imminent Lawless Activity

Finally, Plaintiff's allegation that persons "such as" the "wildly reckless" and drug-taking Edmondson and Darrus would imitate the fictional scenes in *Natural Born Killers* is insufficient to allege that imminent lawless activity was likely to result from the release of the film. The United States Supreme Court has made clear that speech — even offensive speech — cannot be punished based on the possible violent reaction of some weak-willed audience members:

> We have been shown no evidence that substantial numbers of citizens are standing ready to strike out physically at whoever may assault their sensibilities with execrations like that uttered by Cohen. [Wearing a jacket that stated "F___ the Draft" into a courthouse]. There may be some persons about with such lawless and violent proclivities, but that is an insufficient base upon which to erect, consistently with constitutional values, a governmental power to force persons who wish to ventilate their dissident views into avoiding particular forms of expression.

Cohen v. California, 403 U.S. 15, 22, 91 S. Ct. 1789, 1787 (1971). The district court in Davidson applied this principle when it held that the incendiary rap lyrics of Tupac Shakur could not be suppressed based on the potential for violent reaction by some listeners:

> At best the recording reveals that weak-willed individuals may be influenced by Shakur's work. As the Supreme Court explained,

---

ment to imminent unlawful action. *See Walt Disney Productions, Inc. v. Shannon*, 247 Ga. 402 (1981). *Miller v. Warner Bros. Inc.*, Civ. Action No. 96vs117599-F (Fulton Cty. Ga. Dec 3, 1996) (Exhibit "G").

> swaying the weak-willed does not remove constitutional protection from speech.

Davidson, 25 Med. L. Rptr. at 1723. *See also DiFillipo v. National Broadcasting Co.*, 446 A.2d 1036, 1041 (R.I. 1982) ("To permit plaintiffs to recover on the basis of one minor's actions would invariably lead to self-censorship by broadcasters in order to remove any matter that may; be emulated and lead to a lawsuit.").

Plaintiff's petitions allege only that persons "such as" the "wildly reckless" and drug-taking Edmondson and Darrus would be affected by the film's depictions of fictional violence. As the courts in *Cohen, Bill* and *Davidson* all recognized, it is not enough to take speech out of the constitutional protection of the First Amendment merely to allege that certain abnormal or anti-social individuals might react violently to some speech. The mere possibility of such irrational reactions by a handful of the millions of people to view the film does not make fictional depictions of violence "likely to" result in imminent violent acts.

B. Allegations of Subjective Intent Are Not Sufficient to Place Expression Within the *Brandenburg* Exception and Outside the Protection of the First Amendment

As with Louisiana tort law, Plaintiff's conclusory allegation, in the quadruple alternative, that the Warner Defendants "knew, intended, were substantially certain or should have known" that scenes in the film would be imitated by "wildly reckless" drug-taking viewers does not change the constitutionally protected nature of the film. As the Supreme Court made clear in *Hess*, it is not the speaker's subjective intent in the first instance that determines whether the expression is protected, but the objective nature of the speech at issue. In *Hess,* the Indiana courts had determined as a factual matter that Hess had "intended" his shout to result in imminent violence, but the Supreme Court reversed Hess' conviction because his actual speech — although directed at a live audience during a violent street demonstration — was "advocacy of illegal action at some indefinite future time." *Hess*, 414 U.S. at

108, 94 S. Ct. at 328. Hess' subjective intent did not change the protected character of the words that he actually used; because the words he used were protected, his subjective intent was irrelevant. Likewise, in *Davidson*, *supra*, the plaintiffs alleged that rap artist Tupac Shakur "*intended* to produce imminent lawless conduct" with his album *2Pacalypse Now*. 25 Med. L. Rptr. at 1722. The district court held that this allegation did not take the album outside the protection of the First Amendment, however, because "no rational person would or could . . . mistake musical lyrics and poetry for literal commands or directives to immediate action." *Id.* at 1723 (*quoting McCollum v. Columbia Broadcasting System, Inc.*, 249 Cal. Rptr. 187, 194 (Cal. App. 1988)). Because Shakur's speech was recorded on an album, and because it lacked direct commands to the listener to commit violence, *2Pacalypse Now* could not meet the direct advocacy or imminence requirement of *Brandenburg*, regardless of allegations of Shakur's subjective intent to cause harm through the violent reaction of those who listen to his recordings. *Id.* at 1721-23.

In this case, the Court of Appeal erred in holding that Plaintiff's bare allegation of the Warner Defendants' subjective intent was sufficient to fit within the narrow "incitement" exception. Under *Brandenburg*, it is not enough simply to allege "that speech 'was intended to incite and encourage violation of the law.'" *Michigan Protection & Advocacy Service v. Babin*, 799 F. Supp. 695, 721 (E.D. Mich. 1992), *aff'd*, 18 F. 3d 337 (6th Cir. 1994). The actual speech at issue must be such that it "robs the listener of rational thought by demanding immediate action," *id.*, which is not alleged here. Regardless of claims of subjective intent, Plaintiff's pleadings are clear that her theory is not that *Natural Born Killers* was a direct exhortation to violence, but rather that Edmondson and Darrus were *inspired to imitate* fictional violence depicted ("glorified") in a pre-recorded movie. Plaintiff therefore is unable to state a cause of action that does not run afoul of constitutional protections for free expression.

C. The Court of Appeal's Reliance on *Rice v. Paladin Press* in Misplaced

Rather than consider the many analogous cases involving movies and other fictional works, the Court of Appeal relied exclusively on *Rice v. Paladin Enterprises, Inc.*, 128 F.3d 233 (4th Cir. 1997), *cert. denied*, 118 S. Ct. 1515 (1998), in concluding that the First Amendment does not bar Plaintiffs' claims. The Court of Appeal's reliance on *Rice* is misplaced for two reasons: (1) *Rice* is factually a very distinct and unique case; and (2) *Rice's* analysis does not follow *Brandenburg's* "incitement" doctrine, but rather follows a dissimilar, and inapplicable, line of case law.

The plaintiffs in *Rice* were the representatives of three victims of brutal contract killing; the defendant published a book titled *Hit Man: A Technical Manual for Independent Contractors*. The murderer followed dozens of detailed, explicit instructions from *Hit Man*, from using a rental car with stolen license plates, to following step-by-step illustrated instructions on how to make a silencer, to shooting the victims in a certain specified location and manner. *Id.* at 240. The publisher stipulated that Hit Man was "intended to attract and *assist* criminals and would-be criminals who desire *information and instructions* on *how to* commit crimes," and that the publisher "intended and had knowledge" that the book "would be used, upon receipt, by criminals and would-be criminals to *plan and execute* the crime of murder for hire." *Id.* at 241 (emphases added).

The *Rice* court repeatedly stressed the book's *instructional* nature. For example, the court noted the following (all emphases added):

- "the provision of *instructions* that aid and abet another in the commission of a criminal offense is unprotected by the First Amendment," *id.* at 245;
- "speech that constitutes criminal aiding and abetting" can be punished based on "defendants' successful efforts to *assist*

> others by *detailing* to them the *means* of accomplishing the crimes," *id.* at 246;
>
> - the defendants could be held liable for "providing *step-by-step instructions* for murder (replete with photographs, diagrams, and narration) so *comprehensive and detailed* that it is as if the instructor were literally present with the would-be murderer," id. at 249:
> - "a jury could readily find that the provided *instructions* not only have *no, or virtually no, noninstructional communicative value*, but also that their only instructional communicative 'value' is the indisputably illegitimate one of *training* persons *how* to murder," *id.*;
> - the book is a "*purely factual, instructional manual* on murder," *id.* at 255;
> - the book provides "detailed *instructions* on the *techniques* for murder and murder for hire," *id.*;
> - the book "*prepares* and steels its audience to *specific* criminal conduct through exhaustively detailed instructions," *id.* at 256.

In light of the facts, the Fourth Circuit found the proper analysis was *not* whether *Hit Man* can be considered unlawfully inciting under *Brandenburg*, but whether the facts fit more closely into a long line of cases imposing liability for the explicit instruction of how to commit criminal offenses. The court cited cases that, *inter alia*, rejected First Amendment defenses for teaching the methods of tax fraud and detailing how to make illegal drugs, id. at 244-245, finding *Hit Man* to fall within the category of such "instructional" cases:

> Indeed, one finds in *Hit Man* little, if anything, even remotely characterizable as the

> abstract criticism that *Brandenburg* jealously protects. . . . Ideas simply are neither the focus nor the burden of the book. . . . *Hit Man* is, pure and simple, a step-by-step murder manual, a training book for assassins.

Id. at 262, 263.

Of course, Plaintiff's allegation of "inciting" and "inspiring" in the instant case are nothing even remotely similar to the facts of *Rice.* Contrary to the First Circuit's conclusion, the *Rice* court did not hold that a plaintiff may prevail merely by proving the intent to incite or inspire violence through speech. Rather, *Rice* stands for the principle that the intentional assistance of particular criminal activity through the provision of detailed technical instructions can lead to liability for reasons entirely independent of the *Brandenburg* doctrine.

Ironically, the First Circuit appears to have been influenced by its reading of Section IV of the *Rice* opinion, *id.* at 265-267, which explains why that case will *not* lead to expanded liability in "copycat" or "incitement" cases such as this one. After quoting from this section of *Rice* at length, the First Circuit concluded that "plaintiffs have alleged the very intent on the part of the Warner Defendants referred to by the *Rice* court." Opinion, Exhibit "B", at 15-16. But this is inaccurate. But this is inaccurate. The "intent" in *Rice* was the "actual intent to *assist* criminal activity: or "to *assist* another or others in the *commission* of violent crime," 128 F.3d at 265 (emphasis added); that is, aiding and abetting through providing explicit instruction on how to commit particular criminal activity. This is the type of "intent" cited by the *Rice* court, not the allegation that there was intent to "incite" or "inspire" through the depiction of fictional activity aimed at a general audience.

This conclusion is supported by the *Rice* court's emphasis on the "peculiar facts of this case." *Id.* at 265. Indeed, the court concluded that, after exhaustive briefing and research, neither the parties, the *amici*, nor the court found "even a single case that we regard as factually

analogous to this case," *id.* in which "Paladin assisted Perry [the murderer] through the quintessential speech act of providing Perry with detailed factual instructions on how to prepare for, commit, and cover up his murders." *Id.*at 627. In responding to *amici's* fears that its decision would broaden "incitement" liability, the court pointed out that the opinion "is not even tantamount to a holding that all publishers of instruction manuals may be liable for the misconduct that ensues when one follows the instructions which appear in those manuals," and that while publishers of works "which are devoted exclusively to teaching the techniques of violent activities that are criminal *per se*" might have cause for concern, the worries expressed by producers of movies, television, and music are "but anticipatory of cases wholly unlike the one we must decide today." *Id.* at 266.

The First Circuit failed to appreciate that this case is, indeed, "wholly unlike" *Rice*. In a passage quoted by the First Circuit, *Rice* observed that liability cannot arise if speech "incidentally glamorizes and thereby promotes" violent conduct. Opinion, Exhibit "B", at 15 (quoting *Rice*, 128 F.3d at 265). In this case, Plaintiff's *only* allegation about the content of *Natural Born Killers* is that it contains "glorification of violent acts," Third Pet. Exhibit "D", ¶ V(E), which is totally different from the detailed, technical instructions for hired killers found in *Hit Man*, which the *Rice* court found to be unique to that case. The First Circuit's singular reliance on *Rice* in holding the movie here unprotected by the First Amendment is in error, and the Supreme Court should grant writs to harmonize this case with the myriad of other similar cases.

CONCLUSION

The Court of Appeal's ruling is fundamentally wrong and should be corrected by this Court now. Based on a single conclusory alternative allegation that a world-renowned director and major motion picture studio actually intended a film to incite murder, the Court of Appeal has crafted an opinion that stands alone in American jurisprudence. Not only has the Court of Appeal expanded

Louisiana tort law well beyond its current boundaries, but the court did so in a fashion that violates decades-old, well-established constitutional law. No court in America ever has held that the distributors of a fictional movie can be held responsible in tort for the violent reactions of two disturbed drug-induced viewers; every court to consider a similar claim has rejected it.

The Court of Appeal's attempt to disguise its radical departure from established tort and constitutional law is baseless. As the district court correctly recognized, Plaintiff's pleadings supply all the facts needed for Plaintiff's claims to be dismissed as a matter of law. Because Plaintiff has pleaded herself out of court, to permit the intrusive and expensive discovery that the Court of Appeal suggests should occur would be unnecessary, wasteful, and corrosive of the freedom to create artistic works without government-sanctioned intrusion.

This Court should grant writs and reverse the Court of Appeal's ruling now, to harmonize this state's law with the well-established constitutional principles that protect free expression, including expression that some people do not understand or find offensive.

Respectfully Submitted,

_____

Jack M. Weiss
For the Applicants

Supreme Court, U.S.
FILED
FEB 2 1999
CLERK

No. 98-1091

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

TIME WARNER ENTERTAINMENT CO., L.P., *et al.*,

Petitioners,

vs.

PATSY ANN BYERS, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF LOUISIANA, FIRST CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

RONALD S. MACALUSO
MACALUSO, JORDAN AND BROWN
200 North Cate Street
Hammond, Louisiana 70404
(225) 345-5291

R. ROGGE DUNN
Royal Indemnity Company
8131 LBJ Freeway
Suite 700
Dallas, Texas 75251
(972) 234-3400

RICK A. CABALLERO
Counsel of Record
RANDOLPH A. PIEDRAHITA
DUÉ, CABALLERO, PRICE & GUIDRY
A Professional Association
8201 Jefferson Highway
Baton Rouge, Louisiana 70809
(225) 929-7481

JOSEPH A. SIMPSON
305 East Mulberry Street
Amite, Louisiana 70422
(225) 748-8362

Attorneys for Respondents

151010

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

18 pp

PARTIES TO THE PROCEEDING

The petition accurately lists the parties to the proceeding, except that it omits Royal Indemnity Company, who is intervening in the suit for worker's compensation benefits paid to the Byers family as a result of her on-the-job injury.

TABLE OF CONTENTS

	Page
Parties to the Proceeding	i
Table of Contents	ii
Table of Cited Authorities	iii
Statement of the Case	1
A. Factual Background	1
B. Proceedings Below	2
Reasons for Denying the Writ	5
Conclusion	12

TABLE OF CITED AUTHORITIES

Page

Cases:

Bill v. Superior Court of City and County of San Francisco, 137 Cal. App. 3d 1002, 187 Cal. Rptr. 625 (1st Dist. 1982) 10

Brandenburg v. Ohio, 395 U.S. 444 (1969) ... 1, 4, 5, 6, 7, 12

Byers v. Edmondson, 712 So. 2d 681 (La. App. 1st Cir. 1998) 4, 5, 9

DeFillipo v. National Broadcasting Co., 446 A.2d 1036 (R.I. 1982) 10

Herceg v. Hustler Magazine, 814 F.2d 1017 (5th Cir. 1987) 10

Hess v. Indiana, 414 U.S. 105 (1973) 7

Homer National Bank v. Tri-District Development, 534 So. 2d 154 (La. App. 3d Cir. 1988) 7

Illinois Central Gulf Railroad v. Texaco, Inc., 467 So. 2d 1141 (La. App. 5th Cir. 1985) 8

Jarell v. Carter, 577 So. 2d 120 (La. App. 1st Cir. 1991) 7

Kuebler v. Martin, 578 So. 2d 113 (La. 1991) 6

Cited Authorities

Page

Lybrand v. Newman, Drolla, Mathis, Brady & Wakefield, 663 So. 2d 850 (La. App. 5th Cir. 1995) 6

Olivia N. v. NBC, Inc., 126 Cal. App. 3d 488, 178 Cal. Rptr. 888 (1st Dist. 1981) 10

Rice v. Paladin Enterprises, Inc., 128 F.3d 233 (4th Cir. 1997), *cert. denied*, __ U.S. __, 118 S. Ct. 1515 (1998) 9, 10, 11, 12

Roberts v. Sewerage and Water Board of New Orleans, 624 So. 2d 341 (La. 1994) 6

Walt Disney Productions v. Shannon, 247 Ga. 402, 276 S.E. 2d 580 (1981) 10

Way v. Boy Scouts of America, 856 S.W. 2d 230 (Tex. App. 5th Dist. 1993) 10

Yakubowicz v. Paramount Pictures, 536 N.E. 2d 1067 (Mass. 1989) 10

Statute:

La. Code Civ. P. art. 927 6

United States Constitution:

First Amendment ..... *passim*

Cited Authorities

	Page
Rule:	
Fed. R. Civ. P. 12(c)	4
Other Authority:	
New York Times, April 14, 1996	8

STATEMENT OF THE CASE

The petition seeks review of a decision of the Court of Appeal for the First Circuit, State of Louisiana. The opinion of the lower court interpreted Louisiana procedural law to hold Respondents had stated a cause of action which did not run afoul of First Amendment guarantees of free speech (as defined by this Honorable Court in *Brandenburg v. Ohio*, 395 U.S. 444 (1969)). To reverse the decision of the lower court would be akin to holding that mass media defendants are entitled to blanket immunity from the filing of suits which, on their face, set forth valid exceptions to constitutional free speech provisions.

The ruling Petitioners complain of is naught but a recognition of well-established Louisiana procedural law which holds that, for purposes of an exception of no cause of action, the allegations of Respondents' petition are accepted as true. Should plaintiffs be unable to adduce evidence to support their *Brandenburg*-based allegations, there will be ample opportunity for Petitioners to raise the constitutional arguments properly both before and after trial.[1] Thus, Petitioners have neither been irretrievably hauled into court nor been the subject of a judgment which changes constitutional law in any way.

A. Factual Background

On the night of March 8, 1995, Patsy Byers was working alone at a convenience store in rural Louisiana. Sarah

---

1. The lower court did not directly address the merits of Petitioners' First Amendment defense, Respondents respectfully submit neither Respondents nor this Honorable Court should delve too deeply into its merits at this juncture. Nonetheless, Respondents note Petitioners' application "softpedals" the fact there is evidence Petitioners knew or intended imminent lawless activity to follow viewing of their speech. Thus, there is a good faith basis for the pleading.

Edmondson entered the store shortly before midnight; waiting outside was her boyfriend, Ben Darrus. After engaging in a brief conversation with Byers, Edmondson drew a pistol and fired a bullet which shattered Byers' spine. Byers was left a quadriplegic. She eventually perished from a cancer which was not timely detected due to her quadriplegia.

After Darrus and Edmondson were caught, it was learned the pair had repeatedly viewed a videotape of "Natural Born Killers," directed, produced, and distributed by Petitioners, Time Warner Entertainment Company, L.P., Time Warner Inc., Alcor Film & TV GMBH & Co. Produktions KG, Jane and Don Productions, Inc., and Oliver Stone. Said film traced the exploits of a pair of young lovers ("Mickey and Mallory") on their cross-country orgy of graphic murder and mayhem. The film is rife with overt and sublime images of violence and glorification of violence, and leaves Mickey and Mallory as media darlings who escape final punishment for their horrific crimes.

After viewing the tape, Darrus and Edmondson decided to emulate its protagonists, obtained a pistol, left their home state of Oklahoma, and, like Mickey and Mallory, began their own cross-country murder spree. They stopped in Mississippi and murdered a local businessman, Bill Savage. They then went to Louisiana, and randomly decided to rob and murder Patsy Byers, just like Mickey and Mallory did in the film.

B. Proceedings Below

After the Byers family discovered the underlying cause of the teenagers' rampage, Petitioners were sued. The state court petition was amended twice, with the final allegations against Petitioners (referred to as the "Hollywood defendants") reading as follows:

IIC.

Upon information and belief, defendants, Benjamin Darrus and Sarah Edmondson, went upon a crime spree culminating in the shooting and permanent injury to Patsy Ann Byers as a result of seeing and becoming inspired by the movie "Natural Born Killers" produced, directed and distributed by the Hollywood defendants.

* * *

V.(E).

All of the Hollywood defendants are liable, more particularly, but not exclusively: A) for producing and distributing a film (and marketing same on videotape) which they knew, intended, were substantially certain, or should have known would cause or incite persons such as defendants, Sarah Edmondson and Benjamin Darrus. (via . . . glorification of violent acts) to begin, shortly after repeatedly viewing same, crime sprees such as that which led to the shooting of Patsy Ann Byers; B) for negligently and/or recklessly failing to take steps to minimize violent content of the video or to minimize glorification of senselessly violent acts and those who perpetrate such conduct . . . D) for negligently and/or recklessly failing to warn viewers of the potential deleterious effects upon teenage viewers caused by repeated viewing of the film/ video . . .[2]

---

2. Allegations of subliminal messages in the film exhorting violence were also made, but, after expert examination of the video revealed no such detectable messages, this allegation was abandoned.

Appendix to Petition for Writ of Certiorari, at pp. 4a, 5a and 21a. Petitioners then filed an exception of no cause of action, a Louisiana procedural vehicle designed to test whether a suit states a legally sufficient cause of action (akin to a Fed. R. Civ. P. 12(c) Motion for Judgment on the Pleadings).

On January 23, 1997, the Twenty-First Judicial District Court for the Parish of Tangipahoa, State of Louisiana, granted Petitioners' Exception and dismissed the case. Appendix to Petition for Writ of Certiorari, at pp. 21a-25a. On appeal, the Court of Appeal for the First Circuit reversed this decision. Appendix to Petition for Writ of Certiorari, at p. 1a; *Byers v. Edmondson*, 712 So. 2d 681 (La. App. 1st Cir. 1998). The intermediate court held Respondents' allegations were sufficient, standing alone, to state a cause of action against Petitioners which satisfied the *Brandenburg* exception to First Amendment immunity:

> Byers argues that "Natural Born Killers" falls within the incitement to imminent lawless activity exception to the First Amendment . . . [T]o justify a claim that speech should be restrained or punished because it is (or was) an incitement to lawless action, the court must be satisfied that the speech (1) was directed or intended toward the goal of producing imminent lawless conduct and (2) was likely to produce such imminent conduct. Speech directed to action at some indefinite time in the future will not satisfy this test. Moreover, speech does not lose its First Amendment protection merely because it has "a tendency to lead to violence."
>
> In Byers' . . . petition, it is alleged that the Warner defendants intended to incite viewers of the film to begin, shortly after viewing the film, crime sprees

> such as the one that led to the shooting of Patsy Byers. We must accept this allegation as true for purposes of the peremptory exception raising the objection of no cause of action. Once accepted as true, the film "Natural Born Killers," would fall into the unprotected category of speech directed to inciting or producing imminent lawless action and which is likely to incite or produce such action.

Appendix to Petition for Writ of Certiorari, at pp. 14a-15a; 712 So. 2d at 690-92 (citations omitted).

The Supreme Court of Louisiana unanimously denied Petitioners' writ application. Appendix to Petition for Writ of Certiorari, at pp. 26a-27a; *Byers v. Edmondson*, No. 98-1596 (La. 10/9/98); __ So. 2d __. The instant certiorari application followed.

REASONS FOR DENYING THE WRIT

This case is literally in its embryonic stages. No discovery has been taken. All that exists is a lawsuit which almost literally alleges the video in question intended to incite imminent lawless activity and thereby almost literally satisfies the *Brandenburg* criteria as set forth by this Honorable Court. The lower court's judgment is not final because Petitioners may raise their First Amendment defense via summary judgment after discovery. In essence, Petitioners are aggrieved that no evidence beyond Respondents' allegations is necessary to proceed with the lawsuit, and are asking this Honorable Court to pronounce that, in every instance, no suit may be brought against filmmakers for imitative violence that they intended to flow from their motion pictures.

To defeat the exception of no cause of action, Respondents were only required to plead a cause of action which fell under the *Brandenburg* exception to First Amendment immunity. The mere pleading sufficed because Louisiana law dictates that, for purposes of determining whether a cause of action is stated, the allegations of a petition are accepted as true; the suit is to be dismissed only if the plaintiff has no cause of action under any evidence admissible under the pleadings. La. Code Civ. P. art. 927; *Roberts v. Sewerage and Water Board of New Orleans*, 624 So. 2d 341 (La. 1994). Louisiana law demands all allegations be accepted as true in the arena of exceptions of no cause of action, insofar as an exception of no cause of action does not test whether the plaintiff can eventually prove the allegations. *Kuebler v. Martin*, 578 So. 2d 113 (La. 1991); *Lybrand v. Newman, Drolla, Mathis, Brady & Wakefield*, 663 So. 2d 850 (La. App. 5th Cir. 1995).

Respondents stated a *Brandenburg* violation by alleging Petitioners were liable

> for producing and distributing a film . . . which they knew [or] intended . . . **would cause** or **incite** persons such as . . . Edmondson and . . . Darrus . . . to begin, **shortly after repeatedly viewing same**, crime sprees such as that which led to the shooting of Patsy Ann Byers.

Appendix to Petition for Writ of Certiorari, at 4a-5, citing Byers Third Supplemental and Amending Petition, at V.(E) (emphasis added). The requirement of statements on immediacy, incitement, and likelihood were satisfied, as Respondents alleged intentional incitement to begin a cross-country crime spree which began with the murder of Bill Savage and ended with the attempted murder of Patsy Byers.[3]

---

3. Petitioners argue the lower court failed to consider the imminence and likelihood prongs of the *Brandenburg* test. This is simply (Cont'd)

Even if Petitioners correctly assert these allegations were not specific enough to state a cause of action uninsulated by *Brandenburg*'s exception to First Amendment immunity, Louisiana law forbids dismissal of Respondents' action for mere failure to state, verbatim, all elements of the *Brandenburg* test.

Because all allegations are to be construed in favor of maintaining the sufficiency of the petition and allowing the plaintiff the opportunity to later present evidence, *Jarell v. Carter*, 577 So. 2d 120 (La. App. 1st Cir. 1991), the court of appeal was required to read Respondents' allegations generously so that all elements of the *Brandenburg* exception were stated. Even if a charitable reading failed to show all elements of the *Brandenburg* exception were stated, Respondents would be nonetheless be allowed to amend their petition to state with particularity all elements of the *Brandenburg* test. *Homer National Bank v. Tri-District Development*, 534 So. 2d 154 (La. App. 3d Cir. 1988) (even if allegations are lacking, courts must allow plaintiffs opportunity

---

(Cont'd)
not so, as the opinion itself shows the lower court knew and considered all prongs of the *Brandenburg* test:

> [T]o justify a claim that speech should be restrained or punished because it is (or was) an incitement to lawless action, the court must be satisfied that the speech (1) was directed or intended toward the goal of producing imminent lawless conduct and (2) was likely to produce such imminent conduct. Speech directed to action at some indefinite time in the future will not satisfy this test. Moreover, speech does not lose its First Amendment protection merely because it has "a tendency to lead to violence."

712 So. 2d at 690, citing *Brandenburg* and *Hess v. Indiana*, 414 U.S. 105 (1973).

to amend petition to cure objections rather than dismiss); *Illinois Central Gulf Railroad v. Texaco, Inc.*, 467 So. 2d 1141 (La. App. 5th Cir. 1985) (same).

Petitioners claim the decision of the lower court allows

> lawsuits to proceed based on nothing more than conclusory allegations of subjective intent without requiring any showing of an objective manifestation of intent to induce imminent lawless action.

Petition for Writ of Certiorari, at 9.

Based on the above principles of Louisiana law which were repeatedly argued below, Respondents respectfully submit *no showing could have been made*! It should also be noted Petitioners themselves took advantage of the bar on admissibility of evidence at this juncture, as they successfully blocked Respondents' attempts to introduce the "speech" itself, a copy of the tape "Natural Born Killers." 712 So. 2d 685-86 n. 9. Thus, Petitioners have no one but themselves to blame for a published lower court opinion allowing this case to proceed on mere allegations; indeed, if they had merely waited until after discovery and tested the allegations via summary judgment, a "showing" would have been required.[4] Respondents therefore respectfully assert Petitioners should not be heard to complain Respondents did not make the requisite "showing" of either Petitioners' malicious intent or whether their speech was factually likely to incite imminent lawless activity.

---

4. Such a showing would necessarily include exhibition of the tape itself, along with the proud words of Oliver Stone that "The most pacifistic people in the world said they came out of this movie and wanted to kill somebody." New York Times, April 14, 1996.

Petitioners argue this judgment is somehow final and therefore deserving of this Court of last resort's attention. Despite Petitioners' assertions, the lower court did not decide with *any* finality whether, under the facts of this case, the First Amendment insulated Petitioners from liability. The lower court took special pains to hold only that plaintiffs had made the proper allegations under this Court's jurisprudence to state a claim not covered by First Amendment immunity:

> However, in holding that plaintiffs' allegations of intent state a cause of action, **we *do not address* the issue of whether the Warner defendants may later invoke the protection of the First Amendment guarantee of free speech to bar Byers' claim after discovery has taken place. It is only by accepting the allegations in Byers' petition as true that we conclude that the film falls into the incitement to imminent lawless activity exception to the First Amendment.** We agree with *Rice v. Paladin Press, Incorporated*, 128 F.3d 233 [(4th Cir.1997), writs denied, ___ U.S. ___, 118 S. Ct. 1515 (1998)] that the mere foreseeability or knowledge that the publication might be misused for a criminal purpose is not sufficient for liability. Proof of intent necessary for liability in cases such as the instant one will be remote and even rare, *but at this stage of the proceeding* we find that Byers' cause of action is not barred by the First Amendment.

Appendix to Petition for Writ of Certiorari, at 710 So. 2d at 692 (emphasis added). Thus, Petitioners' defense may be addressed again after discovery and via summary judgment, a fact the lower court specifically recognized. 712 So. 2d at 691.[5]

5. The lower court also correctly noted that, in most of the cited by Petitioners, the First Amendment issue was addressed after discovery

(Cont'd)

Respondents feel constrained to add that, on the merits, their action should be allowed to go forward, notwithstanding the purportedly "chilling" effects the mere filing of suits has on free expression. In the recent and previously-cited *Rice v. Paladin Enterprises* decision, this Honorable Court properly left undisturbed an opinion disallowing First Amendment immunity for a media defendant who intended its speech to incite imminent criminal activity.

In *Rice*, a publisher defendant stipulated its book (a manual for murder) was intended to be used by murderers. The lower court found similar arguments of First Amendment immunity from civil suits by victims of those using the book unconvincing:

> Paladin and amici insist that recognizing the existence of a cause of action against Paladin predicated on aiding and abetting will subject broadcasters and publishers to liability whenever someone imitates or "copies" conduct that is either described or depicted in their broadcasts, publications, or movies. This is simply not true. In

---

(Cont'd)
and, in some cases, after full-blown trial. 712 So. 2d at 688. *See also Way v. Boy Scouts of America*, 856 S.W. 2d 230 (Tex. App. 5th Dist. 1993) (dismissal based on First Amendment after motion for summary judgment); *Yakubowicz v. Paramount Pictures*, 536 N.E. 2d 1067 (Mass. 1989) (same); *Bill v. Superior Court of City and County of San Francisco*, 137 Cal. App. 3d 1002, 187 Cal. Rptr. 625 (1st Dist. 1982) (same); *DeFillipo v. National Broadcasting Co.*, 446 A.2d 1036 (R.I. 1982) (same); *Walt Disney Productions v. Shannon*, 247 Ga. 402, 276 S.E. 2d 580 (1981) (same); *Olivia N. v. NBC, Inc.*, 126 Cal. App. 3d 488, 178 Cal. Rptr. 888 (1st Dist. 1981) (judgment of dismissal granted during trial); *Herceg v. Hustler Magazine*, 814 F.2d 1017 (5th Cir. 1987) (judgment dismissing First Amendment claims after contrary jury verdict).

> the "copycat" context, it will presumably **never** be the case that the broadcaster or publisher actually intends, through its description or depiction, to assist another or others in the commission of violent crime; rather, the information for the dissemination of which liability is sought to be imposed will actually have been misused vis-a-vis the use intended, not, as here, used precisely as intended. It would be difficult to overstate the significance of this difference insofar as the potential liability to which the media might be exposed by our decision herein is concerned.
>
> And, perhaps most importantly, there will almost never be evidence proffered from which a jury even **could** reasonably conclude that the producer or publisher possessed the actual intent to assist criminal activity . . . Moreover, in contrast to the case before us, in virtually every "copycat" case, there will be lacking in the speech itself any basis for a permissible inference that the speaker intended to assist and facilitate the criminal conduct described or depicted.

128 F.3d at 249, 254 and 265 (emphasis in original).[6]

While Respondents do not have such a stipulation from Petitioners, they have a procedural conclusion which, at this point in the litigation, carries the same effect: their allegations

---

6. In *Rice*, the court of appeals believed that there could never be another case where a media defendant was either so arrogant or malicious that it would *desire* "copycats" and, worse, that there would be any evidence of this desire. Here, Respondents submit they have such evidence, and should be allowed to further develop this evidence to show their case is not a mere frivolity.

that Petitioners intended to facilitate imminent unlawful conduct and are therefore unprotected per *Brandenburg*. If Stone and the other Petitioners intended (as defined by state law and as supported by excerpts of the interview of Oliver Stone) that those exposed to their speech "go out and kill somebody" right after seeing the movie, then their conduct is, like that presented in *Rice* and unlike that presented in the myriad of decisions cited by Petitioners, unprotected by the First Amendment. Respondents therefore respectfully assert this case is the rarity which does not entitle the "speakers" to First Amendment protection from the fallout of their profit-motivated speech.

CONCLUSION

This case does not, at this time, present a federal constitutional question ripe for adjudication by this Honorable Court. Likewise, this case does not cast a "pall of fear and timidity" as Petitioners suggest, given the lower court's express holding that Petitioners may reassert their First Amendment claims after discovery. Indeed, all that has happened is a state intermediate court interpreted state procedural law and found Respondents stated a claim which, if true, satisfied the *Brandenburg* exception to First Amendment immunity. That Petitioners are not satisfied with the "showing" made to date is irrelevant as a matter of Louisiana law and a matter of fair play. Petitioners chose the exception of no cause of action as the testbed for their First Amendment defense and even utilized rules surrounding the exception to block examination of the speech itself. For these reasons, Respondents pray the petition for certiorari be denied.

Respectfully submitted,

RICK A. CABALLERO
Counsel of Record
RANDOLPH A. PIEDRAHITA
DUÉ, CABALLERO, PRICE
& GUIDRY
A Professional Association
8201 Jefferson Highway
Baton Rouge, Louisiana 70809
(225) 929-7481

JOSEPH A. SIMPSON
305 East Mulberry Street
Amite, Louisiana 70422
(225) 748-8362

RONALD S. MACALUSO
MACALUSO, JORDAN
AND BROWN
200 North Cate Street
Hammond, Louisiana 70404
(225) 345-5291

R. ROGGE DUNN
Royal Indemnity Company
8131 LBJ Freeway
Suite 700
Dallas, Texas 75251
(972) 234-3400

Attorneys for Respondents

No. 98-1091 (3)

Supreme Court, U.S.
FILED
FEB 4 1999
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

TIME WARNER ENTERTAINMENT CO., L.P., *ET AL.*,

Petitioners,

v.

PATSY ANN BYERS, *ET AL.*,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeal Of Louisiana, First Circuit

BRIEF OF *AMICI CURIAE* IN SUPPORT OF THE PETITIONER

WALTER E. DELLINGER
(COUNSEL OF RECORD)
CRYSTAL NIX
O'MELVENY & MYERS LLP
555 13th Street, N.W.
Washington, D.C. 20004
(202) 383-5300

ROBERT C. VANDERET
O'MELVENY & MYERS LLP
400 South Hope Street
Los Angeles, CA 90071
(213) 430-6000
*Counsel for Amici**

HENRY L. BAUMANN
STEVEN A. BOOKSHESTER
1771 N Street, N.W.
Washington, D.C. 20036
(202) 429-5430
Counsel for the National Association of Broadcasters

DANIEL ROBBINS
15503 Ventura Boulevard
Encino, CA 91436
(818) 995-6600
Counsel for the Motion Picture Association of America, Inc.

ANNE H. EGERTON
PATRICIA DUNCAN
3000 W. Alameda Avenue
Burbank, CA 91523
(818) 840-3508
Counsel for National Broadcasting Company, Inc.

DANIEL L. BRENNER
NEAL M. GOLDBERG
1724 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 775-3664
Counsel for the National Cable Television Association

* Amici listed on inside of cover

3698

Amici:

ABC, Inc.

American Booksellers Foundation for Free Expression

American Filming Marketing Association

American Society of Journalists and Authors

Association of American Publishers, Inc.

Authors Guild

California Broadcasters Association

CBS Broadcasting Inc.

Comic Book Legal Defense Fund

Directors Guild of America, Inc.

Fox Broadcasting Company

Freedom to Read Foundation

Independent Producers Association

International Periodical Distributors Association

Los Angeles County Bar

Motion Picture Association of America, Inc.

National Association of Broadcasters

National Association of College Stores

National Broadcasting Company

National Cable Television Association

Periodical and Book Association of America

Producers Guild of America

The Publishers Marketing Association

Recording Industry Association of America, Inc.

Software and Information Industry Association

Video Software Dealers Association

Writers Guild of America, West, Inc.

TABLE OF CONTENTS

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 1

ARGUMENT 3

I. SUMMARY DISPOSITION IS WARRANTED BECAUSE THE COURT EGREGIOUSLY MISAPPLIED SETTLED FEDERAL CONSTITUTIONAL LAW 3

A. Plaintiffs' Complaint Failed To Set Forth The Necessary Allegations Required By *Brandenburg* 4

1. The Complaint Must Allege Immediacy 5

2. The Complaint Must Allege An Inducement To Particular And Identifiable Viewers 10

B. Plaintiffs' Complaint Failed To Allege That Lawless Actions Was A Likely And Foreseeable Outcome Of Defendants' Expression 11

C. The Court Of Appeal Ignored The Heightened Pleading Burden For Claims Implicating The First Amendment 14

II. THIS COURT SHOULD SUMMARILY REVERSE THE DECISION BELOW 16

A. Summary Reversal Is Consistent With The Court's Previous Application Of Rule 16.1 16

B. Summary Reversal Is Necessary To Safeguard Important Constitutional Rights 18

CONCLUSION 20

TABLE OF AUTHORITIES

Page(s)

CASES

Brandenburg v. Ohio,
395 U.S. 444 (1969) ..... passim

Catholic War Veterans of the United States, Inc. v. City of New York,
576 F. Supp. 71 (S.D.N.Y. 1983) 11

Chappelle v. Greater Baton Rouge Airport Dist.,
431 U.S. 159 (1977) 16

Cohen v. California,
403 U.S. 15 (1971) 13

Craig v. Harney,
331 U.S. 367 (1947) 12

Davidson v. Time Warner, Inc.,
No. V-94-006, 1997 WL 405907
(S.D. Tex. Mar. 31, 1997) 12, 13

Davis v. City of Portsmouth,
579 F. Supp. 1205 (E.D. Va. 1983),
aff'd, 742 F.2d 1448 (4th Cir. 1984) 15

Eaton v. City of Tulsa,
415 U.S. 697 (1974) 3

Gertz v. Robert Welch, Inc.,
418 U.S. 323 (1974) 19

Hess v. Indiana,
414 U.S. 105 (1973) 4, 7, 8, 10

Jackson v. Nelson,
405 F.2d 872 (9th Cir. 1968) 15

Kottle v. Northwest Kidney Ctrs.,
146 F.3d 1056 (9th Cir. 1998), *pet. for cert. filed*, 67 U.S.L.W. 3364 (U.S. Nov. 17, 1998) (No. 98-810) 14

Lewis v. Columbia Pictures, Inc.,
No. E011948, 1994 WL 75866 (Cal. Ct. App. Nov. 8, 1994) 12

Landmark Communications, Inc. v. Virginia,
435 U.S. 829 (1978) 12

McCollum v. CBS,
249 Cal. Rptr. 187 (Ct. App. 1988) 8, 12, 13

Miller v. Warner Bros., Inc.,
No. 96vs117599-F (Fulton Cty Ga. Dec. 3, 1996) 11

Moore v. Arizona,
414 U.S. 25 (1973) 17

National Bank of N. Am. v. Associates of Obstetrics & Female Surgery, Inc.,
425 U.S. 460 (1976) 17

National Bowl-O-Mat Corp. v. Brunswick Corp.,
264 F. Supp. 221 (D.N.J. 1967) 14

National Org. for Women v. Scheidler,
510 U.S. 249 (1994) 14

Noto v. United States,
367 U.S. 290 (1961) 7

Olden v. Kentucky,
488 U.S. 227 (1988) 16

Pease v. Hansen,
404 U.S. 70 (1971) 17

Pennsylvania v. Bruder,
488 U.S. 9 (1988) 16

People v. Mighty,
535 N.Y.S.2d 944 (Rochester City
Ct. 1988) 12

Rice v. Paladin Enters., Inc.,
128 F.3d 233 (4th Cir. 1997, *cert.*
denied, 118 S. Ct. 1515 (1998) 9, 10, 20

Ryan v. Scoggin,
245 F.2d 54 (10th Cir. 1957) 15

State v. Blythe,
226 N.W.2d 250 (Iowa 1975) 6

Sutton v. Eastern Viavi Co.,
138 F.2d 959 (7th Cir. 1943) 15

Waller v. Osborne,
763 F. Supp. 1144 (M.D. Ga. 1991),
aff'd, 958 F. 2d 1084 (11th Cir. 1992) 10

Watts v. United States,

394 U.S. 705 (1969) 17

Whitney v. California,
274 U.S. 357 (1927) 5, 6

Winters v. New York,
333 U.S. 507 (1948) 20

RULES

S. Ct. R. 16.1 ..... passim

OTHER AUTHORITIES

Thomas Irwin Emerson, *The System of Freedom of Expression* (1970) 6

Charles Fried, *The Oliver Wendell Holmes Devise Lecture: Perfect Freedom, Perfect Justice*, 78 B.U. L. Rev. 717 (1998) 5, 6

Kent Greenawalt, *Speech and Crime*, Am. B. Found. Res. J. 645 (1980) 6, 7

Arthur D. Hellman, *Error Correction, Lawmaking, and the Supreme Court's Exercise of Discretionary Review*, 44 U. Pitt. L. Rev. 795 (1983) 16, 17

Merriam Webster's Collegiate Dictionary, (10th ed. 1995) 9

E. Barrett Prettyman, Jr. & Lisa A. Hook, *The Control of Media-Related Imitative Violence*, 38 Fed. Comm. L.J. 317 (1987) 6, 7, 13

Robert L. Stern *et al.*, *Supreme Court Practice* (1993) 16

Lawrence Tribe, *American Constitutional Law* (2d ed. 1988) 10, 12

Warren, *The Proposed New 'National Court of Appeals,'* 28 Rec. A.B. City N.Y. 627 (1973) 16

Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* (2d ed. 1990) 14, 15

STATEMENT OF INTEREST

Amici curiae include the following organizations and entities with a direct interest in the outcome of these proceedings:

A. ABC, Inc., CBS Broadcasting Inc., Fox Broadcasting Company, and National Broadcasting Company own and operate television stations across the country and produce and broadcast television shows and movies that are seen throughout the United States, including Louisiana.

B. The American Booksellers Foundation for Free Expression ("ABFFE") was organized in 1990. The purpose of ABFFE is to inform booksellers and other members of the book industry about the dangers of censorship and to promote and protect the free expression of ideas, particularly freedom in the choice of reading materials.

C. The American Filming Marketing Association ("AFMA") is a non-profit organization whose members produce and license the international rights to independent English-language films. Comprised of 130 members, AFMA members generate international revenues in excess of $1.6 billion annually.

D. The American Society of Journalists and Authors is the national organization of independent non-fiction writers. Its 1000-plus members have an abiding interest in protecting the First Amendment. Many of them also have a particular interest in this case and believe that the magazine articles and books that they write, sometimes detailing violent events, and often optioned and produced as television or theatrical films, are put at risk by the decision below.

E. The Association of American Publishers, Inc. ("AAP") is the national trade association of the U.S. book publishing industry. AAP members include most of the major commercial book publishers in the United States, as well as smaller and non-profit publishers, university presses, and

scholarly societies. Defending freedom of expression is one of the association's top priorities.

F. The Author's Guild, founded in 1912, is a national for-profit association of more than 7,700 professional published writers of all genres. The Guild counts journalists, historians, biographers, and other writers of nonfiction and fiction as members. Guild members have won many awards, including the Pulitzer and Nobel Prizes and National Book awards. Their works are valuable contributions to the creative and intellectual fabric of our society. The Author's Guild works to promote the professional interests of authors in various areas, including freedom of expression. The Author's Guild views this case, and all cases that threaten free expression, as bearing directly on the ability of authors to carry on their business of writing as a livelihood.

G. The California Broadcasters Association ("CBA") represents the 101 television and 629 radio stations of California. For the past 50 years, the CBA has worked to ensure the viability and strength of California's free, over-the-air broadcasting system. The Association acts as a technical and educational resource for the industry, advocates on legislative and regulatory matters, and organizes ongoing public information campaigns. The CBA believes Californians are best served by a broadcasting system that provides programming free of government intervention reflecting local interests and audience choice.

H. The Comic Book Legal Defense Fund ("CBLDF") is a non-profit organization dedicated to defending the First Amendment rights of the American comic book industry. CBLDF represents artists, publishers, and distributors, as well as the broader community of specialty retailers and readers.

I. The Directors Guild of America, Inc. ("DGA") is a non-profit corporation duly organized and existing pursuant to the laws of the State of California. DGA is the duly recognized labor organization and exclusive representative for the purposes of collective bargaining of, *inter alia*, directors, assistant

directors, and unit production managers of theatrical and television motion pictures.

J. The Freedom to Read Foundation is an organization established in 1969 by the American Library Association to promote and defend First Amendment rights, support the rights of libraries to include in their collections and make available to the public any work they may legally acquire, and help shape legal precedent for the freedom to read on behalf of all citizens.

K. The Independent Producer's Association is a non-profit trade association representing independent (non-studio) motion picture and television production companies. The members of the IPA are actively involved in producing entertainment programming for both the United States and the world markets. During 1998, IPA member companies produced more than 100 feature-length motion pictures.

L. The International Periodical Distributors Association is the trade association for the principal national periodical distributors engaged in the business of distributing or arranging for the distribution of paperback books and periodicals to wholesalers throughout the United States for ultimate distribution to retailers and the public.

M. The Los Angeles County Bar was formed in 1878 and incorporated as a mutual benefit non-profit corporation in 1953. It is the largest local voluntary bar in the country, with 85 committees and sections, 22, 844 members, and annual revenue and expenses of more than $10,000,000 and 108 employees. It is dedicated to improving the administration of justice, advancing the interest of the profession and serving the public in law-related ways.

N. The Motion Picture Association of America, Inc. ("MPAA") is a not-for-profit trade association founded in 1922 to promote the interests of the motion picture industry in the United States. The MPAA's members include many of the largest production companies and distributors of filmed entertainment for theatrical, television and home video

distribution. MPAA members distribute motion pictures throughout the United States, including Louisiana, and in some 80 countries around the world. MPAA promotes the interests of the motion picture industry by serving as the advocate for the major production companies and distributors of motion pictures, television programs and home video.

O. The National Association of Broadcasters ("NAB"), founded in 1922, is a non-profit trade association that serves and represents television and radio stations and broadcast networks. NAB acts to protect and enhance the ability of its members to freely disseminate news, public affairs, entertainment and other programming to the American people.

P. The National Association of College Stores ("NACS") is a trade association composed of approximately 3,000 college stores located throughout the United States. NACS fears that, if the decision below stands, its members may be subject to similar lawsuits for literary or non-fiction materials sold by them.

Q. The National Cable Television Association is the principal trade association of the cable television industry in the United States, representing the interests of owners and operators of cable television systems serving over 90 percent of the nation's cable households and over 100 cable program networks.

R. The Periodical and Book Association of America, Inc. is an association of magazine and paperback book publishers who distribute their wares through independent national distributors, wholesalers, and retailers, many of whom conduct business over the Internet.

S. The Producers Guild of America ("PGA") is a non-profit organization that has been in existence since 1950. It represents the interests of a substantial number of individual producers as career professionals in the motion picture and television industries. These are the career professionals who, on an individual basis, initiate, coordinate, supervise and

control, either on their own behalf (entrepreneur producer), or on behalf of an employer (employee producer), all aspects of the motion picture and/or television production process, creative, financial, technological or administrative, throughout all phases from inception to completion, including coordination, supervision and control of all other talents and crafts, subject to the provisions of their collective bargaining agreements and personal services contracts. The PGA bylaws impose an obligation "to cooperate, when necessary, with other groups or organizations having objectives or interests in common with this corporation."

T. The Publishers Marketing Association ("PMA") is a trade association representing more than 3,000 publishers across the United States and Canada. Many of PMA's members are small, independent publishers who publish a variety of works, including many controversial topics or involving experimental approaches to writing, which more mainstream publishers have not acquired. They are concerned about the potential financial impact of the decision below as the result of possibly having to defend baseless claims.

U. The Recording Industry Association of America, Inc. ("RIAA") is a trade association whose member companies produce, manufacture and distribute over 90% of the sound recordings sold in the United States. The RIAA is committed to protecting the free expression rights of its member companies.

V. The Software and Information Industry Association represents approximately 1,400 companies in the software and information industries. The computer software companies are leaders in the creation of enabling technologies for the production and distribution of content, whereas the information companies create, disseminate and facilitate the use of a wide variety of content. The Association's membership thrives in great part because of the wide latitude of expression afforded by the First Amendment of the United States Constitution. Any

undue narrowing of this latitude would have a direct impact on their activities.

W. The Video Software Dealers Association ("VSDA") is the trade association for the home video industry, representing more than 3,500 member companies in North America and 22 countries worldwide, including small independently owned video retailers, large video chains and other associated businesses that comprise the home video industry. VSDA vigorously defends the constitutional and legal rights of its members.

X. The Writers Guild of America, West, Inc. ("WGA") is a labor organization representing approximately 8,500 professional authors of stories and screenplays for theatrical and television motion pictures and interactive technologies. The WGA also represents news writers for radio and television. Writers represented by the WGA perform writing services throughout the United States. As an organization of professional authors, the WGA has dedicated itself to the protection of First Amendment freedom of expression unfettered by intrusive government regulation. The WGA has a significant interest in the vigorous and uniform enforcement of First Amendment rights throughout the nation, and in preventing non-meritorious and costly litigation that would chill creative expression.

INTEREST OF AMICI CURIAE

This brief is submitted on behalf of a broad cross-section of media-related organizations, including many of the largest production companies and distributors of filmed entertainment, broadcast, cable and print news organizations, publishing companies, associations of working journalists and book publishers, and businesses, non-profit organizations and guilds involved in the dissemination of ideas.[1] Amici have a significant interest in this matter because they rely on First Amendment protections to preserve the broadest possible scope for creative and nonfiction content that may at times address violent and disturbing issues. In particular, they believe that the decision below not only violates established Supreme Court precedent but impairs vital First Amendment freedoms in ways that will have a chilling effect on a wide range of constitutionally protected expression. Amici, therefore, submit this brief in support of the petition for certiorari. Amici agree with petitioner that plenary review is warranted in light of the magnitude of the court's errors, and the substantial burdens the decision imposes on First Amendment freedoms. Because amici also believe that summary disposition is appropriate in view of the court's manifest deviation from this Court's precedents, amici set forth, in the alternative, why the Court should consider summary reversal under Supreme Court Rule 16.1.[2]

SUMMARY OF ARGUMENT

The decision below that a plaintiff may survive a motion to dismiss merely by alleging that the creators of a mass

---

[1] Written consent of both parties has been filed with the Clerk of the Court. Counsel for amici authored the entire brief, and no party other than amici has made a monetary contribution to the brief.

[2] This provision provides that "[a]fter considering the documents distributed under Rule 15, the Court will enter an appropriate order. The order may be a summary disposition on the merits."

distribution motion picture had a subjective intent to incite viewers to violence grossly distorts the extremely narrow exception to full First Amendment protection carved out in *Brandenburg v. Ohio*, 395 U.S. 444 (1969). No court heretofore has held that the mere subjective intent to incite imminent lawless conduct is actionable. Instead, *Brandenburg* consistently has been held to require direct advocacy, the *objective* circumstances of which demonstrate *both* an intent to incite imminent lawless conduct and a likelihood that such conduct will immediately ensue. Plaintiffs' complaint made no attempt to meet this stringent standard and thus should have been dismissed.

If left intact, the decision will have three pernicious effects – each of which warrants summary reversal of the decision. First, the decision significantly broadens the narrow exception to full First Amendment protection established in *Brandenburg* and erodes the heightened pleading burden litigants must meet to state a claim implicating constitutionally protected expression. Second, the decision undermines the primacy and uniformity of federal constitutional law and creates perverse incentives for litigants to "forum shop" in jurisdictions applying laxer First Amendment standards. Finally, by requiring plaintiffs merely to plead subjective intent, the decision opens the door to a flood of "copy cat" lawsuits based upon facile assertions of intent, which inevitably will prompt self-censorship by content providers. These ramifications will be felt not only by studios but also by a variety of providers of both creative and non-fiction expression. Under the court of appeal's standard, a myriad of entities – from book publishers to newspapers, literary and news magazines to web sites and trade associations – would be exposed to onerous litigation and potential tort liability for discussing or dramatizing violence. This potential damage to fundamental First Amendment values compels amici to support the petition for certiorari.

Even if the defendants' rights could be vindicated by a summary judgment or after a full trial, this possibility –

lessened by the erroneous test the court will be forced to apply – is no reason to leave the decision undisturbed. Rule 16.1 provides for the efficient correction of "palpably clear cases of constitutional error," *Eaton v. City of Tulsa*, 415 U.S. 697, 707 (1974) (Rehnquist, J., dissenting), in order to preserve important constitutional safeguards and the Court's inherent authority. Amici thus respectfully request that the Court grant the petition and summarily reverse the decision below.

ARGUMENT

I. SUMMARY DISPOSITION IS WARRANTED BECAUSE THE COURT EGREGIOUSLY MISAPPLIED SETTLED FEDERAL CONSTITUTIONAL LAW.

The decision of the Louisiana court of appeal is patently erroneous. To survive a motion to dismiss, the court held, a complaint need only allege a single claim: that the defendants "intended to incite viewers of the film to begin, shortly after viewing the film, crime sprees such as the one that led to the shooting of Patsy Byers." (Appendix To Petition For A Writ Of Certiorari ("App.") at 15a.) Once that allegation is accepted as true, "the film 'Natural Born Killers' would fall into the unprotected category of speech directed to inciting or producing imminent lawless action and which is likely to incite or produce such action." (*Id.*) This holding should be overturned.

In permitting the plaintiffs to proceed based only on a conclusory allegation that the defendants had a subjective intent to incite violence without satisfying the other requirements of *Brandenburg* – that (1) defendants directly intended for viewers to commit such violence at once; (2) the utterance was directed at particular and identifiable viewers; and (3) immediate violence was a foreseeable and likely consequence of defendants' expression – the court applied a weaker standard than virtually every other court in the land.

In *Brandenburg*, the Supreme Court overturned the conviction of a Ku Klux Klan leader under Ohio's criminal

syndicalism statute because the statute was not limited to advocacy "directed to inciting or producing imminent lawless action and likely to incite or produce such action." 395 U.S. at 447. In *Hess v. Indiana*, 414 U.S. 105 (1973), a majority of the Burger Court clarified the narrow scope of *Brandenburg*'s incitement to violence exception in reversing a criminal conviction based on the defendant's loud statement that "We'll take the f-----g street later (or again)" as the police tried to disperse antiwar demonstrators from a public street. The defendant's expression did not fall within *Brandenburg*, the Court held, because the speech was "not directed to any person or group of persons" and thus it "cannot be said that [the speaker] was advocating, in the normal sense, any action." *Hess*, 414 at 108-09. Second, the expression was "at worst . . . nothing more than advocacy of illegal action at some indefinite future time" and thus was not directed at, and was unlikely to cause, imminent lawless conduct. *Id.* at 108. In the absence of such a showing, the Court held, Hess' statement could not be construed as "intend[ing] to incite further lawless action on the part of the crowd in the vicinity of the appellant and [as] likely to produce such action." *Id.* In short, under *Brandenburg* and *Hess*, for speech to be denied full First Amendment protection, it must constitute a direct exhortation to an identifiable person or persons to commit violent illegal action at or about the time of the stated expression, with a clear likelihood that such violence will quickly occur. This standard necessarily requires an objective showing of both imminence and the likelihood of immediate lawless action, notwithstanding a speaker's subjective intent. A complaint devoid of such allegations cannot survive First Amendment challenge.

A. Plaintiffs' Complaint Failed To Set Forth The Necessary Allegations Required By *Brandenburg*.

While the court of appeal purported to apply *Brandenburg*, it upheld a complaint that, on its face, did not satisfy a central feature: "imminent" incitement to lawless action. The complaint contained neither (1) an allegation of a close

temporal proximity between the speech in question and the subsequent illegal act, nor (2) a claim that the speech was directed at particular and identifiable viewers.

1. The Complaint Must Allege Immediacy.

Brandenburg's imminence requirement is premised on the view that advocacy is sanctionable only if the speaker effectively "participates" in the violence by directing or instigating it. As Justice Brandeis has stated: "There must be reasonable ground to believe that the danger apprehended is imminent. . . . [E]ven advocacy of violation, however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on." *Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring).

The requirement of immediacy serves two crucial purposes, both of which were undermined by the court of appeal's ruling. First, it provides an important mechanism for distinguishing between, on the one hand, assertions of values and facts that because of their expressive nature are part of the deliberative process and thus entitled to full First Amendment protection, and, on the other hand, utterances that, because of their urgent, instrumental or concrete nature, are intended to and deliberately provoke immediate violent response. In the latter circumstance, the speaker's expression blends conduct and speech in such a way that both speaker and hearer participate in concerted illegal activity outside the scope of First Amendment protection, with the speaker in effect the "aider and abettor" of the illicit actions carried out by the hearer. Such expression – tantamount to "an instrumental communication as part of a course of action"[3] – may be "constitutionally punished only when the communication is so

---

[3] Charles Fried, *The Oliver Wendell Holmes Devise Lecture: Perfect Freedom, Perfect Justice*, 78 B.U. L. Rev. 717, 746 n.35 (1998).

close, direct, effective, and instantaneous in its impact that it is part of the action."[4] As one commentator has stated: "[W]hen words are used to join a conspiracy, to give orders, or to supply instructions in furtherance of some criminal scheme. . . . the law has understood that the words are not being used to express an idea or an attitude so much as they serve as signals and actions."[5]

The second purpose of *Brandenburg*'s immediacy requirement is to separate expression that merely advocates violent action from expression that is so imperative and concrete as to deny listeners the opportunity for a reasoned deliberative response; only the latter category, which by its urgent nature overwhelms rationality, presents a credible threat to public order. *See Whitney*, 274 U.S. at 376 (Brandeis, J., concurring) ("If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.").[6]

---

[4] Kent Greenawalt, *Speech and Crime*, Am. B. Found. Res. J. 645, 751 (1980) (quoting Thomas Irwin Emerson, *The System of Freedom of Expression* 404 (1970)).

[5] Fried, *supra*, at 717. For instance, modern penal law traditionally has punished certain utterances without implicating First Amendment values such as specific inducements, threats and orders to commit crimes; agreements and conspiracies to commit crimes; offers to commit criminal acts; and specific training in criminal acts. *See* Greenawalt, *supra*, at 742-47. As the Iowa Supreme Court stated in response to defendants' claim that their conviction for conspiring to fix prices violated *Brandenburg*: "entering into an agreement to fix prices may hardly be said to be speech, symbolic speech or expression under the ambit of Amendment 1." Greenawalt, *supra*, at 743 (quoting *State v. Blyth*, 226 N.W.2d 250, 265 (Iowa 1975)).

[6] *See also* E. Barrett Prettyman, Jr. & Lisa A. Hook, *The Control Of Media-Related Imitative Violence*, 38 Fed. Comm. L.J. 317, 376 (1987) ("Prettyman & Hook") ("Where sufficient time exists for rebuttal and

(Cont. ...)

Brandenburg's immediacy requirement thus serves as an important gatekeeper of First Amendment freedoms, ensuring that only advocacy that provokes immediate illegal acts is subject to governmental sanction. This standard recognizes that "the mere abstract teaching . . . of the moral proprietary or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action." *Noto v. United States*, 367 U.S. 290, 297-98 (1961).

In this case, plaintiffs' conclusory allegation that defendants intended viewers to commit crime sprees "shortly after repeatedly viewing" the movie was insufficient on its face to satisfy *Brandenburg's* immediacy test. This is clear both from the case law and the facts alleged. Indeed, according to the plaintiffs' own recitation of the facts, the perpetrators did not commit the crime in question until after "travelling cross-country to Louisiana" – a joy ride that necessarily involved considerable delay. (App. at 33a.) But, as indicated above, *see supra* at 5-7, the immediacy requirement mandates virtually contemporaneous lawless action. *See* Prettyman & Hook, *supra*, at 377 ("*Brandenburg* requires the advocacy to be so closely related to the harmful action that more speech could not have prevented the harm."). For instance, in *Hess*, the Court accepted the state court's view that the defendant's use of the word "later" meant that the taking of the street could be performed not immediately but at some subsequent time. As one commentator has noted, "if Hess really did mean to urge illegal action, common sense tells us that 'later' must have meant later during the day of the demonstration; so the opinion seems to mean that in that setting at least, illegal action some hours hence is not imminent." Greenawalt, *supra,* at 651. "Even if 'imminent' contains some degree of flexibility, the

---

consideration, the Supreme Court has long assumed that additional speech will prevent the harm.").

term connotes and is used by the Court to suggest a very short time span between an incitement and the hoped-for action." *Id.* Like "later," "shortly after repeatedly viewing" does not connote an immediate inducement to lawless action, as the perpetrators' delayed response confirms.

Moreover, plaintiffs' attempt to add a new gloss on the imminence test by focusing on the impact of repetition finds no support in the case law. In essence, the complaint alleges that defendants intended viewers to watch the movie repeatedly and that this repetition provoked violent imitative crime from its viewers. On this basis alone, the complaint should have been dismissed. Advocacy that does not *on its own* provoke immediate response without repeated viewing does not constitute the kind of expression that is so concrete and imperative as to pose an immediate threat of lawless action. To the contrary, the very need for repetitive viewing implies that the expression is too abstract to induce immediate action and that there is sufficient delay between movie viewings and deed to allow for considered response.

Plaintiffs' further allegation that the perpetrators viewed the movie "sometimes under the influence of mind-altering drugs," (App. at 33a), underscores the deficiency of their pleading, since there was no allegation that the advocacy itself – without the distortions caused by "mind-altering drugs" – induced an immediate violent response. "Merely because art may evoke a mood of depression as it figuratively depicts the darker side of human nature does not mean that it constitutes a direct 'incitement to imminent violence.'" *McCollum v. CBS*, 249 Cal. Rptr. 187, 194 (Ct. App. 1988).

Plaintiffs' claim that the movie "glorifi[ed] . . . violent acts" by depicting criminals as "celebrities and heroes," (App. at 3a, 5a), also failed to meet *Brandenburg*'s objective requirement of a direct inducement to lawless action since, by definition, glorification is an indirect, non-instructive means of

conveying a particular viewpoint. Indeed, the plain meaning of "glorification" is to "bestow[] honor, praise or admiration"[7] – hardly the kind of direct, inducement to immediate lawless action *Brandenburg* requires.

The court's reliance on *Rice v. Paladin Enterprises, Inc.*, 128 F.3d 233 (4th Cir. 1997), *cert. denied*, 118 S. Ct. 1515 (1998), was misplaced. *Paladin* only *confirms* that plaintiffs' claims are barred by the First Amendment. In *Paladin*, the defendant had *stipulated* that "it actually intended to provide assistance to murderers and would-be murderers which would be used . . . 'upon receipt'" of the defendant's books "Hit Man: A Technical Manual for Independent Contractors" and "How to Make a Disposable Silencer." 128 F.3d at 242. Because of the stipulated instrumental nature of defendant's "expression," the court held that it did not involve pure speech but fell within the "speech-act doctrine [that had] long been invoked to sustain convictions for aiding and abetting the commission of criminal offenses." *Id.* at 244. The defendant's books concededly "aided and abetted the murders at issue through the quintessential speech act of providing step-by-step instructions for murder . . . so comprehensive and detailed . . . as if the instructor were literally present with the would-be murderer." *Id.* at 249.

In this case, however, plaintiffs have not alleged, and indeed cannot allege, that the defendants provided the sort of detailed assistance and counseling in how to commit violence present in *Paladin*. The fact that a film may "glamorize[] and thereby indirectly promote[] such conduct," *id.* at 266, does not bring it within the "speech-act" doctrine. As the court in *Paladin* itself noted, "[i]n only the rarest case, as here where the publisher has stipulated in almost taunting defiance that it intended to assist murderers and other criminals, will there be evidence extraneous to the speech itself which would support a

---

[7] *Merriam Webster's Collegiate Dictionary* (10th ed. 1995).

finding of the requisite intent." *Id.* at 265. Plaintiffs' complaint clearly did not meet this standard.

2. The Complaint Must Allege An Inducement To Particular And Identifiable Viewers.

Plaintiffs' complaint also failed to satisfy the imminence requirement because there was no allegation that the expression was directed at particular viewers. Speech directed toward everyone in general and no one in particular is not the sort of incitement to imminent illegal action contemplated by *Brandenburg* because the speaker, by definition, has no specific hearers he or she is attempting to compel to action. *See Hess v. Indiana*, 414 U.S. 105, 108 (1975). *See also* Lawrence Tribe, *American Constitutional Law* 848 n.57 (2d ed. 1988).

Because plaintiffs could not credibly allege that a major motion picture company intended to prompt any particular viewer or every single viewer to leave the theater and immediately attack someone in sight, the best they could do was allege that "persons *such as* Edmonson and Darrus" were intended to commit violence. But this group is too broad and amorphous to be the intended subjects of a real and immediate provocation to action. Since the movie was broadly released to millions of viewers around the world – all unknown and unidentifiable to defendants – there is no basis to establish the link between utterer and viewer necessary to satisfy the strict requirements of *Brandenburg*.

Courts across the county consistently have reached the same conclusion. For instance, in *Waller v. Osborne*, 763 F. Supp. 1144, 1150 (M.D. Ga. 1991), *aff'd*, 958 F.2d 1084 (11th Cir. 1992), the court rejected a claim that a teenager committed suicide after repeated exposure to the music of Ozzy Osbourne. Despite the court's belief that it was likely "irresponsible and callous for a musician with a large teenage following . . . to portray suicide in any manner other than a tragic occurrence," the court held that "[t]here is no indication whatsoever that defendants' music was directed toward any particular person or

group of persons." 763 F. Supp. at 1151. Likewise, in *Catholic War Veterans of the United Sates, Inc. v. City of New York*, 576 F. Supp. 71 (S.D.N.Y. 1983), the court dismissed in part on First Amendment grounds a complaint alleging in conclusory terms that the constitutional and civil rights of plaintiffs would be violated by the holding of a "Gay Pride Parade." The court found that the plaintiffs' conclusory allegations that the parade should be blocked "based on the possibility that an *unidentified handful of participants* may engage in unlawful conduct" could not survive First Amendment scrutiny, warranting dismissal of the complaint. 576 F. Supp. at 76 (emphasis added).

In sum, because plaintiffs' complaint failed to allege an inducement to immediate lawless action to an identifiable set of viewers, it could not overcome the insuperable First Amendment bar to tort liability. In a virtually identical lawsuit, a Georgia court reached this very conclusion, as did the trial court in this case.[8] The court below should have done the same.

B. Plaintiffs' Complaint Failed To Allege That Lawless Action Was A Likely And Foreseeable Outcome Of Defendants' Expression.

In addition to its failure to apply faithfully *Brandenburg*'s imminence test, the court also ignored another fatal deficiency in plaintiffs' pleading: its omission of any allegation that violence was the likely and foreseeable result of defendants' expression. *Brandenburg*'s "likelihood" test requires an objective showing that the likely outcome of particular expression was lawless action; without such a likelihood, there can be no immediate threat to public order sufficient to withhold First Amendment protection. As this Court has

---

[8] *See Miller v. Warner Bros., Inc.*, No. 96vs117599-F (Fulton Cty. Ga. Dec. 3, 1996) ("the lawsuit, as a matter of law, cannot meet the requirements found in *Brandenburg* v. *Ohio* . . ., which protects statements except direct incitement to imminent unlawful action.") (included at Appendix 1a).

recognized, the "degree of imminence [must be] extremely high before utterances can be punished." *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 845 (1978). *See also Craig v. Harney*, 331 U.S. 367, 376 (1947) ("the danger must not be remote or even probable; it must immediately imperil"); Tribe, *supra*, at 848 n.57 (because there was no evidence in *Hess* that the defendant's remarks "were likely to produce any imminent disorder . . . *Brandenburg*'s second test was not met").

In this case, plaintiffs' complaint failed to include any allegation that violence was a foreseeable and likely outcome of defendants' expression. *See People v. Mighty*, 535 N.Y.S.2d 944, 947 (Rochester City Ct. 1988) (dismissing information charging defendant with inciting to riot because the activity alleged did not create a "clear and present danger of riotous conduct, or intended . . . riot"); *Davidson v. Time Warner, Inc.*, No. V-94-006, 1997 WL 405907, at *21 (S.D. Tex. Mar. 31, 1997) (rejecting plaintiff's claims that defendant's rap music had provoked imitative violent acts because there was no showing that "the illegal conduct . . . would imminently occur after listening to the album"); *Lewis v. Columbia Pictures, Inc.*, No. E011948, 1994 WL 75866, at *3 (Cal Ct. App. Nov. 8, 1994) (dismissing plaintiff's claim that defendant's advertisement for "Boyz 'n the Hood" was actionable since "[s]peech directed to action at some indefinite time in the future is not imminent incitement.").

Indeed, because the expression at issue was disseminated impersonally on a mass basis, it is doubtful that plaintiffs in good faith could have made allegations that met such a standard. To date, virtually every reported case that has found imminent incitement under *Brandenburg* has involved live, direct incitement, which is far more likely than inanimate expression through books, films and television programs to foment a crowd to violence and overcome rational deliberation. *See McCollum v. CBS, Inc.*, 249 Cal. Rptr. 187, 194 (Ct. App. 1988) (neither common sense nor the First Amendment permit

a "rational person" to "mistake musical lyrics and poetry for literal commands or directives to immediate action").

This Court should adhere to the longstanding principle that the fact that a few aberrant individuals may react violently to certain expression does not mean that imminent lawless action is a "likely" outcome as a matter of law. This is particularly true where, as here, the expression at issue is indirect. For instance, in *Cohen v. California*, 403 U.S. 15 (1971), the Court recognized that "[t]here may be some persons about with such lawless and violent proclivities, but that is an insufficient base upon which to erect, consistently with constitutional values, a governmental power to force persons who wish to ventilate their dissident views into avoiding particular forms of expression." 403 U.S. at 23.

To adopt a weaker standard would force content providers to tailor their works to accommodate the most vulnerable and unstable persons in society – an impermissible result in a society constitutionally committed to giving the widest possible breathing space to freedom of expression. *See McCollum*, 249 Cal. Rptr. at 197 ("[I]t is simply not acceptable to a free and democratic society to impose a duty on performing artists to limit and restrict their creativity in order to avoid the dissemination of ideas in artistic speech which may adversely affect emotionally troubled individuals."); *Davidson*, 1997 WL 405907, at *22 ("broadcasters . . . would be chilled into producing only the most mundane, least emotional material").[9]

---

[9] As one commentator stated:

> The result of imposing upon television and movie producers the duty of avoiding any scene that could possibly trigger violent reaction in a few individuals would be a timidity and blandness in programming that few of us would be prepared to accept.

Prettyman & Hook, *supra*, at 379.

C. The Court Of Appeal Ignored The Heightened Pleading Burden For Claims Implicating The First Amendment.

The decision below, which permitted plaintiffs' suit to proceed based upon a conclusory allegation directed to only one element of the *Brandenburg* test, contravened the standards for evaluating motions to dismiss, particularly those involving important First Amendment rights. Causes of action that implicate First Amendment values require plaintiffs to meet a higher pleading burden in order to safeguard constitutional rights. As the Ninth Circuit has noted, "the danger that the mere pendency of the action will chill the exercise of First Amendment rights requires more specific allegations than would otherwise be required." *Kottle v. Northwest Kidney Ctrs.*, 146 F.3d 1056, 1063 (9th Cir. 1998), *pet. for cert. filed*, 67 U.S.L.W. 3364 (U.S. Nov. 17, 1998) (No. 98-810). *See also National Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 264-65 (1994) (Souter, J., with whom Kennedy, J., joins, concurring) (citing with approval a case applying a higher pleading standard for claims involving presumptively protected First Amendment expression).

For this reason, unlike pleadings in other contexts, no liberal construction generally is accorded complaints implicating the First Amendment. *See* 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1245, at 302 (2d ed. 1990) ("[T]he standard for successfully pleading defamation tends to be more stringent than ordinary civil suits because of the unfavored nature of this type of action and the desire to discourage what some believe to be basically vexatious litigation."). For instance, in *National Bowl-O-Mat Corp. v. Brunswick Corp.*, 264 F. Supp. 221 (D.N.J. 1967), the court dismissed a defamation counterclaim in part because the defendant failed "to set out the alleged defamatory statements with sufficient particularity to allow the court to determine if they would support the action." 5A Wright & Miller, *supra*, § 1357, at 359. "If the court had applied the usual liberal

standard for construing a complaint, it probably would have assumed, for purposes of the motion, that the statements were defamatory. . . ." *Id.*

In this case, the court's failure to apply a heightened pleading burden and a narrow construction to plaintiffs' complaint trampled impermissibly on First Amendment values. The court blithely accepted plaintiffs' conclusory allegations and "footless conclusions of law," *Ryan v. Scoggin*, 245 F.2d 54, 57 (10th Cir. 1957), when the proper disposition was dismissal. By concluding that plaintiffs' woefully deficient allegations survived defendant's motion to dismiss, the court of appeal not only failed to give any weight to defendant's First Amendment interests but also subverted the traditional pleading requirement that claims for relief must be supported by factual allegations and not mere conclusory assertions. Even outside of the First Amendment context, courts consistently have dismissed pleadings that failed to plead factual allegations necessary to support a cognizable claim. *See, e.g., Jackson v. Nelson*, 405 F.2d 872 (9th Cir. 1968) (dismissing a civil rights complaint for failure to state a claim when the complaint contained conclusory statements); *Sutton v. Eastern Viavi Co.*, 138 F.2d 959, 960 (7th Cir. 1943) ("No claim for relief is stated if the complaint pleads facts insufficient to show that a legal wrong has been committed. . . ."); *Davis v. City of Portsmouth*, 579 F. Supp. 1205, 1210 (E.D. Va. 1983) ("[M]ore detail often is required than the bold statement by plaintiff that he has a valid claim of some type against defendant."), *aff'd*, 742 F.2d 1448 (4th Cir. 1984). *See also* 5A Wright & Miller, *supra*, § 1357, at 319-20 ("[T]he court will not accept conclusory allegations concerning the legal effect of the events plaintiff has set out if these allegations do not reasonably follow from his description of what happened, or if these allegations are contradicted by the description itself."). The same disposition was compelled here.

II. THIS COURT SHOULD SUMMARILY REVERSE THE DECISION BELOW.

As indicated above, amici believe that plenary review is warranted because of the failure of the court of appeal to apply settled federal constitutional law and the harmful effects this decision will have. As an alternative to full briefing and oral argument on the merits, however, amici urge the Court to consider summary reversal of the decision under Rule 16.1.

A. Summary Reversal Is Consistent With The Court's Previous Application of Rule 16.1.

Where, as here, a lower court clearly has misapplied established Supreme Court precedent, this Court frequently has granted a petition for purposes of summary disposition without a full hearing on the merits. *See, e.g., Olden v. Kentucky*, 488 U.S. 227 (1988); *Pennsylvania v. Bruder*, 488 U.S. 9 (1988); *Chappelle v. Greater Baton Rouge Airport Dist.*, 431 U.S. 159 (1977). As one former Chief Justice has stated: "There are many instances where the Court, without granting plenary review, has summarily reversed, remanded or taken other direct action to achieve what the Justices conceived to be essential justice."[10] *See also* Robert L. Stern *et. al.*, *Supreme Court Practice* 247 (1993) ("This kind of reversal order usually reflects the feeling of a majority of the Court that the lower court result is so clearly erroneous, particularly if there is a controlling Supreme Court precedent to the contrary, that full briefing and argument" is unnecessary.).

Summary disposition is particularly appropriate where a state court has misunderstood or disregarded federal law since "the Supreme Court is the only tribunal with power to oversee

---

[10] Warren, *The Proposed New 'National Court of Appeals,'* 28 Rec. A.B. City N.Y. 627, 640-41 (1973), *cited* in Arthur D. Hellman, *Error Correction, Lawmaking, and the Supreme Court's Exercise of Discretionary Review*, 44 U. Pitt. L. Rev. 795, 801 (1983).

compliance by state courts with the dictates of the federal Constitution and laws."[11] "If the Court, by failing to correct error when it has the opportunity to do so, allows state courts to deny federal rights, the supremacy clause could easily become little more than an exhortation."[12] Such a concern is most acute where fundamental rights are at stake.

This Court's per curiam decision in *Watts v. United States*, 394 U.S. 705 (1969), is instructive. In *Watts*, during a public rally at the Washington Monument, the speaker, in protesting the draft, stated that "[i]f they ever make me carry a rifle, the first man I want to get in my sights is L.B.J." 394 U.S. at 706. Agreeing with the defendant that the statement was nothing more than "a kind of very crude offensive method of stating a political opposition to the President," *id.* at 707, the Court summarily reversed the conviction. As in this case, the Court noted that "[w]hat is a threat must be distinguished from what is constitutionally protected speech." *Id.*

Likewise, in *Moore v. Arizona*, 414 U.S. 25 (1973), the Supreme Court summarily disposed of a decision of the Arizona Supreme Court affirming a denial of a pretrial writ of habeas corpus to a defendant alleging a speedy trial violation. The Court granted the petition and vacated the judgment on the ground that the court improperly had held that prejudice was the "sole touchstone" for proving a speedy trial violation in contravention of previous precedents. 414 U.S. at 26. *Moore* is perfectly analogous to this case, in which the Louisiana court

---

[11] Hellman, *supra*, at 801 n.34.

[12] *Id. See also National Bank of N. Am. v. Associates of Obstetrics & Female Surgery, Inc.*, 425 U.S. 460 (1976) (summarily reversing a state court decision holding that the venue provision of the National Bank Act were permissive rather than exclusive in contravention to Supreme Court precedent); *Pease v. Hansen*, 404 U.S. 70 (1971) (summarily reversing a state court decision improperly applying an equal protection precedent).

of appeal improperly held that an allegation of subjective intent was the "sole touchstone" for satisfying *Brandenburg*.

B. Summary Reversal Is Necessary To Safeguard Important Constitutional Rights.

In addition to being consistent with previous applications of Rule 16.1, summary reversal is necessary to preserve vital First Amendment rights. If left undisturbed, the decision will cause three significant constitutional harms. First, in eroding the heightened pleading requirements litigants must meet to fit within *Brandenburg*, the decision impermissibly subjects previously fully protected expression to governmental sanction. In so doing, the decision recasts *Brandenburg* as no longer a narrow, rarely satisfied exception, but rather a general, easily invoked principle – the "exception" that swallows the rule. Such a result significantly reduces the scope of constitutional protection for expressive content, causing a chilling effect on the free and full dissemination of ideas.

Second, the anomalous decision, if left intact, will undermine the uniformity of federal law and permit a state court to trample upon well-established constitutional norms. The deviation of lower courts from fundamental constitutional principles will create uncertainty as to the reach of First Amendment protection and generate perverse incentives for litigants to forum shop in jurisdictions applying less stringent standards.

Finally, by allowing plaintiffs to subject defendants to the continued burdens and costs of litigation, with the attendant likelihood of self-censorship, the decision denies defendants the very protections the First Amendment is designed to provide; continued litigation is *itself* a reduction in First Amendment freedoms. Defending against an action that survives a motion to dismiss or for judgment on the pleadings is onerous. The escalating expenses – financial and otherwise – of discovery and pre-trial procedures are enormous and create a significant incentive to avoid further litigation, either by settling

constitutionally meritless claims, or by avoiding potentially controversial expression in the first instance. The First Amendment does not countenance either result. The Constitution requires courts to protect expression not only against judicial penalization of the speech but equally against legal proceedings that constrict unfettered expression by inducing self-censorship. If plaintiffs unable to meet the stringent *Brandenburg* test can nonetheless impose the costs of litigation on content providers, the protections guaranteed by the First Amendment are by that very fact significantly diminished.

Indeed, such a result will have ramifications not only for motion picture and television companies, but for a variety of other providers of creative and non-fictional material including book publishers, cable companies, newspapers and magazines, web sites and trade and non-profit organizations involved in the dissemination of ideas and information. Under the court of appeal's standard, a variety of works would be subjected to continued litigation and the risk of tort liability. Many such works contain and even arguably glamorize often violent suicides, murders and other brutalities: Shakespearean drama contains 16 suicides; the lead character in *Anna Karenina*, concluding that suicide was the only solution, throws herself under a train; Arthur Miller's Pulitzer prize-winning play, *Death of a Salesman,* depicts suicide as a courageous achievement; and the operas of Puccini, Mannotti and Verdi all contain self-inflicted death. In addition, a variety of seminal movies and television epics -- including *Amistad*, *The Deer Hunter*, *Roots*, *Apocalypse Now*, *Taxi Driver* and *Schindler's List* -- all contain depictions of violence. Yet, if after dissemination of such works, imitative violence occurred, under the court's standard, these content providers would face legal exposure. Such a result would eviscerate traditional First Amendment protections accorded even pernicious or offensive expression. *See, e.g., Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974) ("However pernicious an opinion may seem we depend for its correction not on the conscience of judges

and juries but on the competition of other ideas."); *Winters v. New York*, 333 U.S. 507, 510 (1948) ("Though we can see nothing of any possible value to society in these magazines [stories of "bloodshed and lust"], they are as much entitled to the protection of free speech as the best of 'literature.'").

Even if, as expected, the defendants in this case ultimately prevail on summary judgment or at trial, they will be unable to secure review by this Court of the state appellate court's ruling. That ruling will thus stand, creating a continued source of confusion about the meaning and proper application of this Court's precedents and encouraging "copy cat" suits involving protected expression. Ironically, the Louisiana court of appeal's willingness to permit plaintiffs' case to proceed is exactly the result that the Fourth Circuit in *Paladin* confidently predicted would not occur since "[i]n the 'copy cat context,' it will presumably never be the case that the broadcaster or publisher actually intends, through its description or depiction, to assist another or others in the commission of violent crime." *Rice v. Paladin Enters., Inc.*, 128 F.2d 233, 265 (4th Cir. 1997).

This case poignantly demonstrates why the stringent standards of *Brandenburg* must be vigilantly guarded; a door, once cracked, easily can be pushed wide open. It would be a sad day indeed if the creators of important artistic works with profound impact on American thought and culture were forced to expend considerable time and resources in court defending lawsuits merely because a few aberrant individuals mimicked the powerful scenes depicted. It would be sadder still if, due to fear of tort liability, the most challenging, provocative and dramatic parts of such works were left on the cutting room floor.

CONCLUSION

For the reasons stated above, amici respectfully request that the Court grant the petition on the merits or for purposes of summarily reversing the Louisiana court of appeal's decision.

Respectfully submitted,

WALTER E. DELLINGER
(COUNSEL OF RECORD)
CRYSTAL NIX
O'MELVENY & MYERS LLP
555 13th Street, N.W.
Washington, D.C. 20004
(202) 383-5300

ROBERT C. VANDERET
O'MELVENY & MYERS LLP
400 South Hope Street
Los Angeles, CA 90071
(213) 430-6000
Counsel for Amici

HENRY L. BAUMANN
STEVEN A. BOOKSHESTER
1771 N Street, N.W.
Washington, D.C. 20036
(202) 429-5430
Counsel for the National Association of Broadcasters

DANIEL ROBBINS
15503 Ventura Boulevard
Encino, CA 91436
(818) 995-6600
Counsel for the Motion Picture Association of America, Inc.

ANNE H. EGERTON
PATRICIA DUNCAN
3000 W. Alameda Avenue
Burbank, CA 91523
(818) 840-3508
Counsel for National Broadcasting Company, Inc.

DANIEL L. BRENNER
NEAL M. GOLDBERG
1724 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 775-3664
Counsel for the National Cable Television Association

February 5, 1999

APPENDIX

IN THE STATE COURT OF FULTON COUNTY

STATE OF GEORGIA

MARGO MILLER, Individually, and as Administratrix of the Estate of Olin Miller,	:	
Plaintiff,	:	CIVIL ACTION
V.	:	File No. 96vs117599-F
WARNER BROTHERS, INC., TIME WARNER ENTERTAINMENT, L.P., TIME WARNER, INC., WARNER HOME VIDEO, INC., REGENCY ENTERPRISES, INC., IXTLAS COPORATION, INC., J.D. PRODUCTIONS, INC., ALCOR FILMS, OLIVER STONE, RONNIE BEASLEY AND ANGELA CROSBY,	:	
Defendants.	:	

ORDER

This matter came before the Court for oral argument on the motion to dismiss filed by Defendant Time Warner Entertainment Company, L.P. on its behalf and also on behalf of Defendants Warner Home Video and Warner Brothers. Having heard oral argument, considered the briefs and

reviewed the file, the Motion is GRANTED and the case is dismissed on the pleadings as to the above-named Defendants.

This lawsuit, as a matter of law, cannot meet the requirements found in *Brandenburg v. Ohio*, 395 U.S. 444 (1969), which protects statements except direct incitement to imminent unlawful action. *See Walt Disney Productions, Inc., v. Shannon*, 247 Ga. 402 (1981).

Also, Plaintiff's allegations of subliminal flash frame stimuli claim only that Defendants used them to intentionally entice individuals to view the movie more than once so as to be more profitable and to increase the effect of the movie's message. Neither of these results, even if proven at trial, is motionable, particularly in Georgia where the state constitution is even broader than the First Amendment and where lawsuits seeking to impose liability on speech are disfavored.

SO ORDERED, this 3rd day of December, 1996.

MELVIN K. WESTMORELAND, JUDGE
STATE COURT OF FULTON COUNTY

Supreme Court, U.S.
FILED
FEB 18 1999
CLERK

No. 98-1091

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

TIME WARNER ENTERTAINMENT CO., L.P., *ET AL.*,

Petitioners,

v.

PATSY ANN BYERS, *ET AL.*,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeal Of Louisiana, First Circuit

REPLY BRIEF FOR PETITIONERS

JACK M. WEISS
MARK B. HOLTON
AMY L. NEUHARDT
GIBSON, DUNN & CRUTCHER LLP
200 Park Avenue
New York, NY 10166
(212) 351-4000

THEODORE B. OLSON
Counsel of Record
THOMAS G. HUNGAR
JOSEPH D. MATAL
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Counsel for Petitioners

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

I. The Decision Below Dramatically Departs From The Overt Advocacy, Imminence, And Likelihood Requirements Established In *Brandenburg* And Adhered To In Numerous Precedents Of This And Other Courts 1

II. The Decision Below Conflicts With The Requirement That Plaintiffs Must Point To Objective Manifestations Of Intent 5

III. Immediate Review Is Essential In Order To Avoid Chilling Protected Speech 6

CONCLUSION 9

TABLE OF AUTHORITIES

CASES Page(s)

Bose Corp. v. Consumers Union, Inc., 466 U.S. 485 (1984) 6

Brandenburg v. Ohio, 395 U.S. 444 (1969) 1

Dombrowski v. Pfister, 380 U.S. 479 (1965) 8-9

Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46 (1989) 7

Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Bd. of Culinary Workers, 542 F.2d 1076 (9th Cir. 1976) 8

Hess v. Indiana, 414 U.S. 105 (1973) 5

Hydro-Tech Corp. v. Sundstrand Corp., 673 F.2d 1171 (10th Cir. 1982) 3

Kottle v. Northwest Kidney Ctrs., 146 F.3d 1056 (9th Cir. 1998) 3

McCollum v. CBS, Inc., 249 Cal. Rptr. 187 (Ct. App. 1988) 4

National Org. for Women, Inc. v. Scheidler, 510 U.S. 249 (1994) 3

National Org. for Women, Inc. v. Scheidler, 897 F. Supp. 1047 (N.D. Ill. 1995) 4

Rice v. Paladin Enterprises, Inc., 128 F.3d 233 (4th Cir. 1997), *cert. denied*, 118 S. Ct. 1515 (1998) 2

Zamora v. Columbia Broadcasting Sys., 480 F. Supp. 199 (S.D. Fla. 1979) 4

REPLY BRIEF FOR PETITIONERS

Respondents' brief in opposition confirms petitioners' position: The court below has departed dramatically from the First Amendment standard laid down in *Brandenburg v. Ohio*, 395 U.S. 444 (1969). According to respondents and the court below, "Petitioners *intended* to *facilitate* imminent unlawful conduct *and are therefore unprotected* per *Brandenburg*." Opp. 12 (emphasis added). Respondents thus concede that the principal question of First Amendment law raised in the petition is squarely presented here—*i.e.*, whether mere intent, standing alone, is sufficient to satisfy the requirements of the *Brandenburg* exception. That question is plainly one of substantial importance, and it is ripe for decision now.

Respondents attempt to hide behind state pleading rules, suggesting that this case is in its "embryonic" stages and that any errors below can be corrected in subsequent proceedings. In so arguing, respondents ignore the fact that the decision below rests squarely on an erroneous interpretation *of the First Amendment*. As such, the decision below will control the future course of litigation in this and countless other First Amendment cases unless and until the court of appeal's error is corrected by this Court. Immediate review is therefore necessary, before the glaringly incorrect decision below results in a further chilling of protected speech.

I. The Decision Below Dramatically Departs From The Overt Advocacy, Imminence, And Likelihood Requirements Established In *Brandenburg* And Adhered To In Numerous Precedents Of This And Other Courts

Respondents halfheartedly suggest that the court below must have adhered to *Brandenburg* because it acknowledged the existence of the imminence and likelihood requirements. Opp. 6-7 & n.3 (citing Pet. App. 15a). They concede, however, that the only allegation relied upon by

the court below as sufficient to satisfy *Brandenburg* is that of subjective intent to incite lawless action (Opp. 6). That allegation does not even describe the actual content of petitioners' film, let alone allege facts sufficient to demonstrate that the film itself actually satisfies the advocacy, imminence, and likelihood requirements. As if to dispel any doubt that the court below reduced *Brandenburg* to a one-step test satisfied solely by an elliptical allegation of the speaker's subjective intent, respondents unabashedly assert that the court of appeal was correct in focusing exclusively on petitioners' intent: "Petitioners *intended* to *facilitate* imminent unlawful conduct and are *therefore* unprotected per *Brandenburg*." Opp. 12 (emphasis added); *see also id.* ("If . . . Petitioners intended . . . that those exposed to their speech 'go out and kill somebody' right after seeing the movie, then their conduct is . . . unprotected by the First Amendment.").[1]

---

[1] The heavy reliance that respondents and the court of appeal place on *Rice v. Paladin Enterprises, Inc.*, 128 F.3d 233 (4th Cir. 1997), *cert. denied*, 118 S.Ct. 1515 (1998), further confirms their rejection of key elements of the *Brandenburg* test. The *Rice* court did not find that the speech at issue in that case—detailed instruction in the techniques of criminal activity—fell within the *Brandenburg* exception. Instead, the *Rice* court held that *Brandenburg* does not even apply to such "speech-act[s]." *Id.* at 244, 255. Neither the court below nor respondents assert that petitioners' feature-length film constitutes a "speech-act," or that *Brandenburg* is inapplicable here, but they nonetheless rely on the test applied in *Rice*—which expressly rejects *Brandenburg*'s imminence and likelihood elements. *See id.* at 246 ("*Brandenburg's* 'imminence' requirement [does not restrict punishment of] . . . 'successful efforts to assist others by detailing to them the means of accomplishing the crimes.'") (citation omitted); *id.* at 263-65 (rejecting "imminence" and "likelihood" elements). Thus, respondents' invocation of *Rice* simply confirms that the decision below amounts to a clear departure from *Brandenburg*.

Respondents attempt to shield the court of appeal's First Amendment ruling from review by asserting that it somehow rests upon Louisiana pleading principles. In respondents' view, apparently, the court of appeals' departure from the *Brandenburg* test is explained by the fact that Louisiana courts (like most American courts) treat allegations as true and read them "generously" at the pleadings stage. Opp. 6-7. Louisiana's pleading rules are irrelevant, however. Petitioners do not challenge the court of appeal's decision to assume the truth of respondents' intent allegation, however far-fetched. Instead, petitioners seek review of the court of appeal's patently erroneous conclusion that, as a matter of federal constitutional law, subjective intent alone suffices to pierce the shield of the First Amendment.

Nor is the Louisiana court of appeal's rule of First Amendment law explainable as a "generous" interpretation of facially ambiguous allegations. The court made no pretense of examining the complaint for allegations sufficient (even when read "generously") to support findings that the content of the film was itself sufficient to satisfy the overt advocacy, imminence, and likelihood requirements. Instead, the court looked *solely* to petitioners' subjective state of mind, and made clear that, under its reading of the First Amendment, subjective intent *alone* is the touchstone for liability. That conclusion is not a rule of pleading; it is a patently incorrect and dangerously narrow construction of the Constitution's free speech guarantee.

Importantly, respondents do not challenge the principle that the First Amendment imposes a heightened pleading requirement on plaintiffs seeking to impose liability on presumptively protected speech. *See* Pet. 20 (citing *National Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 264-65 (1994) (Souter, J., joined by Kennedy, J., concurring); *Kottle v. Northwest Kidney Ctrs.*, 146 F.3d 1056, 1063 (9th Cir. 1998); *Hydro-Tech Corp. v. Sundstrand Corp.*, 673 F.2d 1171, 1177 n.8 (10th Cir. 1982)). Thus,

even if respondents' claim that Louisiana courts read allegations "generously" might have some explanatory power in other circumstances, it is doubly irrelevant here: There is nothing to suggest the decision below rests on such a doctrine, and it would have been constitutional error for the court of appeal to apply that doctrine in this case given the obvious First Amendment implications of respondents' claims. Respondents cannot shield a state court decision from this Court's scrutiny by pointing to a state procedural rule that was not invoked, and could not constitutionally be applied if it were.

Respondents also assert in passing that "most" of the conflicting authorities cited by petitioners arose at the summary judgment stage or after a trial, apparently in an attempt to suggest that those cases can be meaningfully distinguished on that ground. *See* Opp. 9 n.5. As noted in the petition (Pet. 20), however, claims closely analogous to respondents' have consistently been dismissed at the pleadings stage as well. *See, e.g.*, *McCollum v. CBS, Inc.*, 249 Cal. Rptr. 187, 191-95 (Ct. App. 1988); *National Org. for Women, Inc. v. Scheidler*, 897 F. Supp. 1047, 1083-89 (N.D. Ill. 1995); *Zamora v. Columbia Broadcasting Sys.*, 480 F. Supp. 199 (S.D. Fla. 1979). Respondents point to no authority for their apparent belief that *Brandenburg* is somehow inapplicable at the pleadings stage, nor does any such authority exist.

In the end, respondents simply are unable to show that their allegations even begin to satisfy the elements of the *Brandenburg* exception. Indeed, far from refuting petitioners' arguments that respondents' allegations fall well short of the constitutional requirements, respondents' own factual clarifications weigh heavily against the constitutional adequacy of their allegations. Thus, respondents acknowledge that Edmondson and Darrus viewed *Natural Born Killers* in Oklahoma, drove through Mississippi, and only then entered Louisiana, where they were purportedly "incited" (by a film seen many hours or days earlier) to shoot respondents' decedent. Opp. 2. As demonstrated in

the petition (Pet. 16-18), this fact alone compels the conclusion that respondents cannot satisfy the "imminence" requirement. Yet the court of appeal glossed over that fatal flaw in respondents' case by the simple expedient of eliminating the imminence requirement altogether (and the advocacy and likelihood requirements as well).

Perhaps recognizing the obvious errors in the court of appeal's interpretation of the First Amendment, respondents argue in the alternative that even if their allegations fail to satisfy the requirements of *Brandenburg*, under Louisiana law they "would be nonetheless allowed to amend their petition to state with particularity all elements of the *Brandenburg* test." Opp. 7. Had the court of appeal followed that approach, of course, petitioners would not be before this Court. But the court below did *not* hold that respondents' failure to satisfy the advocacy, imminence, and likelihood elements required dismissal or repleading. Instead, the court of appeal simply dispensed with those crucial elements altogether, holding *as a matter of First Amendment law* that intent alone suffices to satisfy the *Brandenburg* test. *See* Pet. App. 15a ("[o]nce accepted as true," the allegation that petitioners "intended to incite viewers of the film to begin, shortly after viewing the film, crime sprees" suffices in itself to place the film "into the unprotected category"). It is that egregiously wrong pronouncement of First Amendment law that necessitates this Court's review.

II. The Decision Below Conflicts With The Requirement That Plaintiffs Must Point To Objective Manifestations Of Intent

Respondents do not contest that the challenged speech must contain objective manifestations of intent to incite immediate violence, and that courts must conduct an independent review for such manifestations before liability can be imposed. *See Hess v. Indiana*, 414 U.S. 105, 109 (1973) (*Brandenburg* requires "evidence or rational inference from the import of the language" that the speech was

"intended to produce, and likely to produce, *imminent* disorder") (emphasis in original); *Bose Corp. v. Consumers Union, Inc.*, 466 U.S. 485, 499 (1984) (courts have "an obligation to 'make an independent examination of the whole record' in order to make sure 'that the judgment does not constitute a forbidden intrusion on the field of free expression.'") (citation omitted). Indeed, respondents' brief in opposition even quotes *Rice v. Paladin* to the effect that "the speech itself" must contain a "basis for a permissible inference that the speaker intended" an illegal end. Opp. 11.

Instead, respondents argue that Louisiana procedural rules bar the introduction of evidence when a defendant challenges the legal sufficiency of a complaint on its face, and note that petitioners adhered to these rules in the court below. Opp. 8. Once again, respondents' recourse to state pleading rules is of no avail, and misses the point. At the pleadings stage, plaintiffs need not provide tangible evidence to support their claims, but their allegations regarding "the speech itself" must at least provide a "basis for a permissible inference that the speaker intended" to incite illegal action. Opp. 11. State procedural rules do not and cannot relieve respondents of their obligation to allege facts regarding the nature and content of the challenged speech sufficient to provide reasonable, objective manifestations of the speaker's intent. Nor can state procedural rules relieve state courts of their First Amendment duty to review the totality of the plaintiff's allegations for such objective manifestations, as well as objective manifestations of the other, equally critical components of the *Brandenburg* standard: advocacy, imminence, and likelihood. *See* Pet. 20, 22-24; *Bose*, 466 U.S. at 499. Plainly, none of these obligations was satisfied here.

III. Immediate Review Is Essential In Order To Avoid Chilling Protected Speech

Respondents' brief in opposition devotes much energy to the proposition that the glaring errors in the decision

below need not concern this Court because they can be corrected in subsequent proceedings. Thus, respondents argue that no one has been "irretrievably hauled into court" (Opp. 1), and that nothing has been decided "with *any* finality" (Opp. 9), because petitioners' First Amendment rights might still be vindicated "after discovery." Opp. 5, 9. On that premise, respondents urge this Court not to "delve too deeply into [the] merits" (Opp. 1 n.1), and claim that "[t]his case does not . . . present a federal constitutional question ripe for adjudication" (Opp. 12). Respondents' efforts to avoid review are wholly unpersuasive.

First, the court below ruled as a matter of First Amendment law that *all* elements of the *Brandenburg* test are satisfied *solely* by a speaker's subjective intent to cause violence in the future. Contrary to respondents' assertion that this ruling does not "change[] constitutional law in any way" (Opp. 1), the decision below substantially modifies, and dramatically expands, the previously narrow *Brandenburg* exception. Absent immediate review, the court of appeal's published decision will undoubtedly affect further proceedings in this case and in other First Amendment cases. The decision below will inevitably inhibit speech that falls within the court of appeal's new, radically expanded version of the *Brandenburg* exception; indeed, it would be irrational for mass media speakers not to examine and perhaps modify their speech with an eye to avoiding similar claims. "[I]t would be intolerable to leave unanswered, under these circumstances, an important question of freedom of the press under the First Amendment." *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 56 (1989).

In addition, respondents' repeated protests that the First Amendment can still be vindicated "after discovery" further belie their claim that the decision below will not chill protected speech. If the underlying complaint has no merit—as respondents' protests and their inability even to plead adequate facts plainly indicate—then there is no reason not to swiftly vindicate vital First Amendment values and dismiss the action now. Allowing meritless lawsuits

to "drag on through the discovery stage" may induce parties exercising First Amendment rights "to forego presenting [their] views." *Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Bd. of Culinary Workers*, 542 F.2d 1076, 1082 (9th Cir. 1976). Prolonging the life of this action would send the clear message that disfavored speech and speakers can be punished by being forced to undergo the rigors and costs of burdensome discovery, even if the underlying claims are wholly lacking in merit.

The court of appeal's exclusive and erroneous focus on subjective intent only exacerbates this chilling effect. Questions of subjective intent are inherently difficult to resolve prior to trial, and necessarily invite costly and intrusive discovery. The decision below strips *Brandenburg* of all of its objective factors—the elements that could otherwise be called forth at the pleadings stage to dispatch speedily a frivolous lawsuit. By conditioning liability solely on the "motivations" of the defendant, and thereby increasing the burden and expense of First Amendment litigation, the decision below inevitably will have "a chilling effect on exercise of" expressive rights. *Franchise Realty*, 542 F.2d at 1082. Significantly, respondents offer no response to (and certainly do not challenge) petitioners' observation that "[a]bsent plenary review by this Court at this stage of the litigation, the creative world will soon be treated to the spectacle of a respected and innovative film director being subjected to extensive discovery into his creative thought processes, all in furtherance of the lower court's erroneous and single-minded focus on the speaker's subjective intent." Pet. 27.

That further proceedings await petitioners is no excuse for denial of review in this Court. Even if the court of appeal's expansive construction of the *Brandenburg* exception were not an ongoing threat to petitioners' further defense, this Court's immediate review would be necessary to "avoid[] making vindication of freedom of expression

await the outcome of protracted litigation." *Dombrowski v. Pfister*, 380 U.S. 479, 487 (1965).

CONCLUSION

The petition for a writ of certiorari should be granted. As suggested by *amici* the Motion Picture Association of America *et al.*, the Court may wish to consider summary reversal.

Respectfully submitted.

JACK M. WEISS
MARK B. HOLTON
AMY L. NEUHARDT
GIBSON, DUNN & CRUTCHER LLP
200 Park Avenue
New York, NY 10166
(212) 351-4000

THEODORE B. OLSON
Counsel of Record
THOMAS G. HUNGAR
JOSEPH D. MATAL
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Counsel for Petitioners

February 18, 1999